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TREATISE

OF

Church-lands & Tithes:

In two Parts.

CONTAINING,

An Historical Account of Ecclesiastical Revenues, Churches, Church-yards, Church-offices, Benefices, Glebes, Manses, Patronage, Monachism, Religious, and some Military-orders, with a particular History of Tithes: And a clear and full Discusion of Points of Right and Controversy, relating to these Matters; And shewing how far the SCOTS and Canon Laws do agree, and differ. A distinct Explanation of Actions before the Commission, concerning Ministers Stipends; Tithes; Erecting or Transplanting Churches; And the Inlarging or Restricting Parishes. And of Actions about Ministers Stipends, Tithes, &c. falling under the Cognifance of the Lords of Session.

By WILLIAM FORBES Advocat.

EDINBURGH,

Printed by the Heirs and Successors of Andrew Anderson, Printer to the Queens most Excellent Majesty: And to be sold at John Vallange's Shop, on the North-side of the Street, a little above the Cross, Anno DOM, M DCC V.

Labelland and the Rechellen chia artin de la la compania de la compania del compania de la compania de la compania del compania de la compania del compania de la compania del compania de la compania del compania dela compania del compania del compania del compania del compania de mankin he weelfelt man very with a light one the let And a clear gold of Discussion is reliable to the real and Con profit, want to that thereis Andalas into with a second rought on the born 2 1 O. M. Sidings with And the state of t Con authority as a committee of the pendent of the less : A resident of the Art grown of the property part of the part of the Allers St. 1. The state of the and the second second

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TO

The Right Honourable,

Sir Hugh Dalrymple

OF

North-Berwick,

Knight Baronet,

Lord President of the Session, One of Her MAJESTIES most Honourable PRIVY COUNCIL, &c.

My LORD,

Wou'd not be understood by this Dedication so vain, as to think any thing I do of this Nature can be of much Use to You, whom the Nation has a due Veneration for as an Oracle of Law, and Ornament of the Bench; Where You Justly fill a Worthy Father's Chair, and Exercise that Virtue,

tue, and those Sublime Parts, which GOD has fo Liberally bestowed on You, to good Purpose in the Service of Your Queen and Country. All I propose, is only to pay my Acknowledgements in this easie Way, for the Learned and Useful Advice I received from your Lordship, in some Points handled in this Treatife. I'll fay nothing about my Book to You, who are the best Judge of Standard-Law and Sense, but that its Fate depends upon Your Approbation; Which I presume will recommend the Performance to the Knowing World, in spite of the Weakness and Defects of the Author, who studies to approve himself with all Sincerity and Affection,

My LORD,

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Your Lordships most Humble, and Devoted Servant,

WILLIAM FORBES.

PREFACE.

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able,

there are seven Cruces, That is, so many Perplexed Laws, whereof tout the True and Genuine Meaning, Interpreters have rack'd their Fancies: So we have two Subjects in our Law generally not well understood, viz. Bills of Exchange, and Ecclesiastical Benefices, consisting of the Temporality and Spirituality of Church lands and Tithes. I have lately endeavour'd to clear up the former, and the Favourable Reception of that Essay hath incouraged me to try my hand upon the Latter.

The Reason why so few at this day have very distinct Notions of that Matter, doth Obviously proceed from this, That the Canon Law, the we never burnt it as Luther did, (a) hath since the Suppression of Popery been little Studied in Scotland: And so the different Regular and Secular Offices of the Church of Rome, to which before the Reformation particular Benefices stood annex'd, are turn'd a kind of Mystery to many.

(a) At Wittemberg in a Solemn Affembly.

Bene-

Benefices are Lands and Rents given to Ecclesiasticks for Service to be done to the Church. About the Nature and Rights whereof, a multitude of Books, Prolix and Perplex'd enough, are extant: Such as those written by Rebuff, Bengæus, Garcia, D'Espeisses, Duaren, Barbosa, Dartis, Corradus, and others, which for Brevities sake

shall be Nameless.

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Peter Rebuff a French Professor of Law, who flourished at Paris in the Sixteenth Century, is the first whom I find to have distinguished the Spirituality from the Temporality of Benefices, by a formal Treatise upon Tithes. But since his time that Subject hath been much, tho not well, handled. Rebuff, H. Canisius, A. Moneta, and the Authors of the Parsons Law, Parsons Counsellour, and Parsons Guide, are those I cite most frequently. The Writers beyond Sea do meary us with their needless Cases and Questions about the Pope's Power in Alienating, Impoling, and Dispensing with Tithes; The various Kinds of em; the Persons by, and to whom they should be pay'd; the Manner of Payment; what Things are Subject to Tithing; and the Punishments to which the Notpayer of Tithes is expos'd, whereof Rebuff enumerates no fewer than 36 Sorts. Lawyers do of I

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do strangely vary and sluctuate, as to the Point of Prescription in Tithes; Nor are they more of a Piece or consistent with themselves, when about to determine the Subject Tithable. Which may probably be ascrib'd to their confounding the Positive, with the Negative Prescription; And not distinguishing the Characteristick of Parsonage from that of

Vicarage Tithes.

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The Divine Right of Tithes hath long been an Argument of Debate to Canonists; School-men, Protestant Divines, and o-thers: But differently managed. The Generality of the Canonists, Some few excepted, imperiously dictate the Divine Right of Tithes from the Moral Law, which is also preach'd up by some of the English Clergy, and Zealoufly maintain'd by Sir Henry Spelman. The School-men, and great Lawyers not a few, plead that Maintenance is due to the Ministry Jure Divino out of the Annual Product of our Substance; But that the Quota of a Tenth Part is meerly of Ecclesiastical and Human Institution. Others are not Positive or Clear which of these Opinions to declare for. Doctor Forbes (a) thinks the Debate not so very Necessary, since the Divine Right of Tithes might be supported

⁽a) Theolog. Moral. Part 3. Lib: 8. Cap. 2. N. 13.

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⁽a) Considerations touching the likeliest Means to remove Hirelings out of the Church.

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The Clergy were not insensible of this, and therefore sent out Armed Pens against that Tithe-historian, upon the first appearance of his Book; which threatned so great Danger to their Copy-holds, and Parsonage-Barns. Our Countrey man Sir James Semple, and Mr. Stephen Nettles attack'd the first and second Chapters, concerning Scripture-Testi-mony, and the Practice of the Jews. B. Montague, Dr. Sclaiter, D. Tildesly, and others pretend to answer his whole Book, but do it in my Apprehension more Tartly than Strongly. Dr. Comber bath collected and improven the Substance of all that had been urg'd before him: Commends the Author's Industry and Parts, but censures him for Partiality, and Mistakes. To reconcile which, he tells us, that Mr. Selden was not much above 30 Years of Age when he wrote his History, and being a Man of Business, was forced to take many of his Quotations upon Trust from others. A late ingenious Writter (a) goes another way to Work with Mr. Selden, whom he pretends to Confute ex concessis, and by the By throws away some of bis Banter upon Milton; Alledging, that he wrote for Hire against his own Opinion.

(a) Effay concerning the Divine Right of Tithes by the Aufor of the Snake in the Grass. Some Some tell us, that Selden's Book was compiled in Resentment of the Play called Ignoramus, presented by the Cambridge Schollars to King James, upon his coming there in that sharp Winter 16:4: The which Play doth much expose and ridicule the Common Lawyers. But whatever was the Occasion of Mr. Seldens printing his Thoughts upon that Subject, his work is still justly esteemed by the Learned World, and keeps it's Ground, notwithstanding all the Objection-shot that hath been levelled at it.

Sir George Mackenzie of Rosehaugh, Advocat to King Charles II, Who hath obliged his Countrey with several useful Works, did once set about the clearing of the mysterious part of our Law concerning Tithes: But he had scarce well begun, when Interruptions of Business diverted the Prosecution of

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Having undertaken to treat the Complex Subject of Benefices; I shall gratifie the Readers anticipating Curiosity, with a short Sketch of the Performance. As Benefices do consist of a Temporality and Spirituality: So this Treatise is divided in two Parts; The first being allotted for the Temporality, and the second for the Spirituality.

The first Part is thrown into this Order.

I begin with a brief Hint concerning the precarious Mean of Subfistance of the Primitive Clergy; and shew why, and when the Patrimony of the Church was term'd Benefices; and explain the kinds of 'em, viz. Regular and Secular Benefices, Titles, and Commendams. For understanding the Nature of Regular Benefices, there is an Historical Relation of the Origine, Nature, and Progress of Monachism and Religious Orders, and of their regular Polity. Secular Benefices are distinguished into Orders and Dignities; into those of Cure, and Sine-Cures; and into Prelacies, and the Livings of the inferior Clergy, Such as Parish-Churches, Chappelries, and Altarages. Parish-Churches are divided into dependent and independent Benefices: Under the former are comprehended Mensal, and under the Latter Common-Churches, and those under Patronage. All which things are fully discoursed of, and cleared up: With a particular Account of the Rise, Nature, Progress and Fate of Patronage. These Matters are succeeded by the History of Ecclesiastical Revenues from the Commencement of Christianity, till the appointing of Commissions of Parliament for Planting of Churches, and modifying

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Stipends to Ministers out of the Tithes. And

then the Temporality of Benefices is treated

of

The Spirituality of Benefices is the Subject of the Second Part. Where I treat of Churches, Church-yards, Manses, Glebes, and Tithes. The Method pursued in clearing up the Subject of Tithes is this; After premising of a distinct History of them, the Question by what Law Tithes are due, is discust. Into which more Learn'd than Use-

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ful Controversy I dip no further, than only to set down different Opinions; With the Great Lines of Arguments adduc'd for proving Tithes to be due by the Law of GOD and Nature, and to Answer them Breifly. I explain the Several kinds of Tithes, the different Rights of them, their Nature, and how Acquir'd and Extinguished; The Burdens affecting Tithes; and how they are made effectual by Payment : Being Specially Careful all along to distinguish the Positive from the Negative Prescription, and Parsonage from Vicarage. Because Tithes are the Common Fund of Ministers Provision, the One whereof is Modified & Allocat, and the Other Valued and sold by Decreets of the Commission; And Points of Right arising from thence are Decided by the Lords of Session: Actions before the Commission are first treated; and then such as fall under the Cognisance of the Lords of Session. I have wav'd the Forein and Unprofitable Questions and Controversies with which the Prodigious Volumes of the Doctors concerning Benefices and Tithes do Swell; Contenting my self to notice what is therein Homogenious to our Constitution; and how far the Scots & Canon Laws do Agree and Differ. But have not spar'd throughout the whole Treatise to make useful Digressions.

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gressions of Illustration, History, and Description, here and there; As the Darkness and Importance of the Matter seem'd to require it. I don't upon all Occasions cite my Author for avoiding Prolixity, except in Points of Right or Law: But there is not any thing here, that I know, positively ad-

-vanc'd without Good Authority.

Having form'd this contracted Idea of my Book to please the Reader, I shall for his further Satisfaction declare what Materials and Helps I had in the Compiling. sides the particular Law-tracts concerning Benefices and Tithes, which are here made use of only in so far as they are founded in the Analogy of our own Law: I have perused Histories not a few, and consulted Original Charters, Chartularies of Abbacies, and other Manuscripts. Iciteupon Occasions Craig de Feudis, Sir Geo: Mackenzie's Observations upon the Acts of Parliament; And Sometimes those Learned Notes upon Dirletoun by Sir James Stuart of Gutters Her Majesties Advocat. Sometimes again I mention that Elaborate Composure by Sir James Dalrymple of Killoch, one of the Principal Clerks of Selfion, which is coming out under the Title of Collections concerning the Scotish History. I one particular Thanks to

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to that Great Antiquary, for generously affording me such Helps as were in his Hands any way respecting the Subject of my Book. While my Hand is in, I must not forget my best Acknowledgements for the many Hints of Direction I got in the Learned and Judicious Viscount of Stair's Institutions: To which Book for its Universal Use, I may Justly apply the antient Proverb concerning Azo's Summ: He who wants it, should sell his Cloke and buy it. I was put to the more Trouble in perfecting this Work, through the loss of the Commission-Registers: But yet dare say that few Material Occurences before that Judicature have escap'd my Observation. For I had an Abstract of all that pass'd till November 1673. And any Decreet of Moment since that time hath been Friendly Communicated to me by the Parties, or their Doers.

At EDINBURGH the 8th. Day of March 1705 Years.

NENT the Petition presented to the Lords of Her Majesties Privy Council by Mr, William Forbes Advocat: Shewing, That where the faids Lords are in use to Incourage the Author of any new Book, by granting to him the Sole Priviledge of Printing and Vending the same; And the Petitioner having composed A Treatise of Church-lands and Tithes, &c. Which will clear up that mysterious part of our Law; Therefore Craving to the Effect after-mentioned: The Lords of Her Majesties Privy Council do hereby Grant to the Petitioner his Heirs or Assignies, the Sole Priviledge of Printing, Vending, and Selling the foresaid Book, Entituled, A Treatise of Church-lands and Tithes, &c. And discharges all other Persons whatsomever to Print, Re-print, Sell, or Import into this Kingdom any of the faids Books for the space of Nineteen Years from the date hereof; And that under the Pain and Penalty of Confiscation of the faids Books, to the Use of the Petitioner and his Foresaids; And farder, under the Penalty of Five Hundred Merks Scots Money, to be pay'd by the Contraveeners to the Petitioner, or his Foresaids, besides the Seizure and Forefaulture foresaid. Extracted by me

W

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ROBERT FORBES, Cls. Sti. Concilii.

TREATISE

Church-Lands, and Tithes, &c.

PART. I.

CHAP. I.

Why, and when, the Patrimony of the Church was called Benefices? The Division of Benefices into Regular and Secular, and Into Titles and Commendams, Explained. Where of the Rise, and Nature of Commendams, and the Difference betwixt Temporary, and Perpetual Commendams.



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HE Primitive Chriftian Clergy lived precariously on the Free-will Offerings of the People. The Reason whereoffome ascribe to their perfecuted State, that did not admit of more fix'd Endowments; others con-

ecture, that they fought not after these, from

a Prospect of the sudden and infallible Ruine that was coming upon Jerusalem. When the Cloud of Persecution was dispelled, and the Sun of Prosperity began to shine upon the Church, Generous Converts appeared mighty forward to give her certain Rents, and Possessions, which Church-men enjoyed in common, for fome time: But wearying of this, the Stock of the Church came to be divided among them, and particular Revenues annex'd and mortified to particular Offices. This divided Patrimony of the Church goes wer under the Denomination of Benefices, Benefices were Terms us'd, in times past, to signi- wer fy Funds given to Souldiers, for a Reward of ble their Services: So called, because they were of T the Essects of Bounty and Liberality. The ham Name pass'd to Ecclesiasticks about the Twelsth of M Century, when they got the like Funds of they Subfistence,

2. There were Regular Benefices belonging Profito Monks and Regulars; and Secular Benefime fices which were the proper Livings of Church lams men: And both confisted of a Temporality form and Spirituality. By the Temporality we mean migh Lands, with other Civil Rights and Possessi But 1 ons; and under the Spirituality comprehend cou'd Tithes, Churches, Church-yards, Church-men as re Glebes, and Manies. The Tithes are com Baldu puted to be more than a fourth part of the Con Rent of Scotland; and the Temporality to being t at least a fourth. (a)

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⁽a) Mackenzie Observ, on the 277 Act 15 Parl. J. 6.

^{3.} Benefice

2. Benefices again of both kinds were either given in Title, or Commendam. He who had a Benefice in Title, or qui erat in Titulo, had Right thereto tanquam suum, during his Life; with Power to grant Rights of it, and dispose of the Rents: And was called Titular, perhaps from the old Custom of Posting upon Altars. , the or Churches, the Titles and Arms of those presented to them.

4. Such as have Benefices in Commendam on? ffices. ly, are termed Commendators. These at first goes were only design'd as Stewards and Overseers. Bene to call for and receive the Rents, until Titulars figni- were provided; for which they were answerard of able, and lyable to hold Compt. In Process were of Time, some of 'em turn'd Factors in Rem The Juam, and Titulars in Effect. By the Influence welfth of Moyen and Friendship at the Court of Rome, nds of they got Powers to dispose upon the Benefice in the same manner as Titulars, and to apply the onging Profits to their own Use, during their Life-Bene-time. Hence arose the Distinction of Commenchurch lams into Temporary, and Perpetual. The orality former, as being in favours of the Church, we mean might have been granted by the Bishop. (a) Possessi But no meaner Man than the Pope himself, ch-men us respectu omnia Beneficia sunt Manualia, as re com Baldus expresseth it. By the 3. Act 1. Parl. J. of the Commendams are discharg'd, without annularly to being the Deeds of Commendators: And there-

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⁽a) Garcia de Beneficiis, Tome I. P. 4 C. 4. N. 8. Zoef. Decretal. Lab. 3. Tit. 5. N. 61. (b) Ibid. Garcia, Ibid.

(4) fore many fuch have been fustained fince that But then Rights made by Commenda. tors, tho with Consent of the Chapters, are only binding in our Law, during the standing of the Commendators own Right. (a) The Reason for introducing Perpetual Commendams was partly, that the Pope might be able to compliment his Favourite, with the Enjoy. ment of a Benefice under the Title of Commendator, who was incapable by the Canon Law to hold the same as Titular: Partly. that two incompatible Benefices might be bestowed upon one Person, without infringing the Canons, by making him Titular in the one, and Commendator in the other; or byly, giving him both in perpetual Commendam their But a Grant of a Benefice in Commendam wa Med presum'd to be Temporary, and a Trust to me the Titulars behoot; unless conceived express or in favours of the Obtainer for his Lifetime were with Power to apply the Rents to his owner fr

Have 5. Some Benefices are called Great, or Con flyin fistorial Benefices, from the Popes Custom othe bestowing them deliberatly in the Confistor lelve

of Cardinals.

Use. (b)

tary, 6. For understanding the Nature of Regul brea lar Benefices, it will be fit to give some Hi an storical Account of Monachism, and Religionat ous Orders. verte

CHAP TOW

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⁽a) Mackenzie Observ. on the Act 3. Parl. 1. J. 3. (b) Mari Hope Maj. Pratt,

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CHAP. II.

he History of the Origine, Nature, and ndams, Progress of Monachism, and Religious Orders.

Canon ONKS, at the beginning, were Partly. a parcel of Men, whom the Heat be beof Persecution, in the Infancy of inging Christianity, had forc'd into Dein the farts; where they liv'd more fafeor by ly, and ferv'd God without Disturbance. All sendam their Employment consisted in Prayer and am wa Meditation, and Reading the Holy Scripust to mres. Of this fort were our ancient Culdees, expressor Keldees: So termed, either because they ferime were Cultores Dei, according to Hector Boeth; is own or from Living in Cells, as B. Spotswood wou'd have it. They were Christian Britains, who or Conflying Dioclesian's Persecution, retired first to from othe Isle of Man, and afterwards spread them. nfifton lelves through this Nation. They lived folitary, but famous for Learning and a good Life, Regu breathing a Spirit of Devotion: And left such me Hi an Opinion of their Holiness behind 'em, Religionat their Cells, after their Death, were converted into Churches. So, Kilmarnock, Kilparick, Kilriny, &c. is as who should say, Gella . 3. (b. Marnoci, Gella Patricii, Cella Niniani, &c.

2. Many of the Monkish Devoto's, the times HAP rowing more calm, found so much Content in a retired Life, as they were loth to return to Secular Bufiness. Being acted by a mistaken Principle, as if the Perfection of the Christian Religion consisted not in Action, but in Retirement and Contemplation; and our highest Imitation of Christ lay in following him into the Wilderness to be tempted of the Devil, and not in walking as he walked, who conversed with the World. Yea, some not thinking it sufficient simply to withdraw for Devotions fake, from the Press of the People, and Noise of a Tempting World, were pleas'd with all to expose themselves to the most austere Exercises of Mortification. Simeon Stylites, or of the Pillar, may ferve for an Example, who liv'd in the First Century, and was surnamed from his Abode upon a Pillar, 36 Cubits high, where he stood not a few Years with a Chain to his Foot, Assiduous in Prayer, and Fasting after a strange fashion.

3. But tho' many of the Solitaries wou'd not abandon their Lurking Places, even after the Blast of Persecution was over; yet the most part sound it convenient to go together into Monastries, where they might be affishing and comfortable to one another. This was done by the Instuence of Columba's Perswasion, who in Congallus the Second's Reign, return'd from Ireland, whither he had gone (a) with S. Patrick to affish in the Conversion of that Nation. He sounded the Monastery of Icolombis for that end, in one of our Western likes.

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Where he led a Pious and Exemplary Life, keeping strict Discipline over his Monks: To whom he gave Precepts of Direction, without bliging them to any Vows. After this Example, other Monastries were erected at Abernetby, Dunkeld, Kilrimont, Abercorn, Melrofs, Lochleven, Monimusk, Kirkaldy: And the Mo. nastry of Icolmkil had an extended Jurisdiction over all the rest. These Monastries were Nurferies and Seminaries of Religion, and Learning, out of which Parochial Churches were planted with Ministers. Buchanan tells us, that Palladius was the first Bishop in Scotland, and that till he came here, the Church was rul'd by these Monks with more Simplicity and Holiness, and less Pride and Pageantry. But others are of Opinion, that they finding the Number of the Faithful much increas'd, chused Bishops out of their own Number, as Ambulatory Superintendents of the Church, called Episcopi Scotorum. These Keldees being diligent and fruitful in Works of Piety, were in such Esteem, That Constantine 3, one of our Kings, died a Keldee at S. Andrews. They did always mightily oppose the Introduction of Popish Innovations: But the Emissaries of Rome having gained upon the easy Mind of King David; a Legate from Pope Innocent 2 was received in Scotland in the Year 1138, with a great deal of Ceremony and Respect. After which time Prelates began to get up their Heads among us, and to drive us to Superstition and Idolatry: But were not able to suppress the Keldees, as that Learned and Judicious Antiquary S. Fames

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Fames Dalrymple observes, (a) till the beginning of the Fourteenth Century. Pains was taken first to Proselyte their Abbots with the Bait of Preferment to new erected Bishopricks and Keldees posses'd of Parochial Churches were fuffer'd to enjoy their Benefices during Life. At length what by these, and forcible methods, that Pious Set of Men was quite thrust out: Upon whose Ruines, a most corrupt Regular and Secular Clergy fet up. Monachism in Scotland, by the Distinction of Vows, Rules, and different Orders, became a motely kind of thing: And Monks, without regard to thefe, turn'd quite unruly and disorderly.

4. Tis beside my purpose to speak of all the Religious Orders, Historians are not agreed about the Number of 'em, Mr. Fox, (b) reckons up no fewer than 102 different Orders of Monks and Friars in Christendom. fuffice me to notice the chief of those that took

Footing in Scotland.

5. S. Basil founded the most ancient, if not the only Order of Monks in the East; S. Augufline contriv'd a famous Order in Africk; and Benedict an Italian born at Nursi, was the first who brought the Monks in Europe under the Ties of Vows, and Rules as to Lodging, Habit, and Diet. His Disciples were called Benedica tines. The Abbeys of Icolmkil, Dumfermling, S. Colm, Aberbrothock, and the Priories of Coldinghame and Trefontana were inhabited by

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⁽a) Collections concerning the Scottish Historie, Chap. 9. (b) Acts and Monum,

Monks of this Kidney: And from this Order, many others have sprung, as those of Valombre in Tuscany, the Cartbusians, Cistercians, and the Congregation of Cluny.

6. Malvoisin Bishop of S. Andrews introduc'd the Monks of Valombre among us, (a) with whom the Priories of Archattan, Lesmahagoe, Pluscartie, and Beawly were planted. Those of

Pluscartie Wrote a Scots Chronicle.

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7. The Austere Carthusian Order, (so called from a frightful Solitude near to Grenoble in Dauphinee) was fet up by Brune a Canon of Reims, about the Year 1086. But the Learned differ as to the Occasion of his Retreat. Some ascribe it to a Prodigy, said to have happen'd while he was present at the saying of Mass for a famous Doctor of Paris, who lifted up his Head thrice from off the Bier, crying out. first, that he was Accus'd, then Judg'd, and finally Damn'd, by the just Judgment of God. Others disprove that Story, alledging, Bruno had no other Reason for his Renouncing the World, than a Sense of the Vanity on't. and a Detestation of the loofe Lives of several King James the First brought these Monks. Carthusians into Scotland; and built them a Beautiful Priory in Perth. Their Institution was of the most rigid kind. They were not allowed to go out of their Monastry, or to converse together; But were enjoined perpetual filence, and forbid to eat Flesh in any case whatsoever, or to look upon the fair Sex. Volateran reports

⁽a) Anno 1219.

of Brune their Father, that, for 50 Years, he wou'd never fee a Womans Face.

8. The Monks of the Abbey of Molesn within the Diocese of Langres in France, havin about the Year of our Lord 1098 extremel deborded from the Rule of their Institution 21 of them, together with Robert the Abbol concerning a just Abhorrency of the Dissolut Life of their Fellows; left the Monastry, and Tix'd at Citeaux, a wild and desolate Solitud in the Diocese of Chalons in Burgundy: Thenc came the Name of Ciftercians, Resolving upo a strict and Reformed Life, according to the Discipline of S. Bennet; They, by the Autho rity of the Bishops of Lyons, and Chalons, and Otho I. Duke of Burgundy, erected an Abbey And diffinguished themselves by a white Habit from the Benedictines, who went in black. first they seem'd altogether mortified to the foon acquired great Riches World, but through a mighty Opinion that Men had o their Piety. This Order was approven by Urban 2; mightily increas'd under Innocent 2 and was exeem'd from payment of Tithes by Adrian 4. For which Immunity I know no other Reason, if it was not because they proto be a fort of Refin'd Benedictines, and that Pope was at first a Benedictine Monk; or elfe, that there was Bribery in the cafe; For Popes commonly granted to Monks for Money, as many Exemptions as they pleas'd The Cistertians were named Bernardines, for that their Order was render'd famous and Amplify'd by S. Bernard, to that Degree of Power,

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ars, Power, as it govern'd most part of Europe a whole Age both in Spiritual and Temporal Molesin Concerns. The Monastries of Sandel, Soul-Seat, Dundrennan, Melrofs, Newbottle, New-Abbey, Glenluce. Balmerino, Cowper in Angus, Deer, Kelso, Guiross, and the Priories of El-Abbourded and Machline belong'd to this Order of issolution is the Monastry of Passey was once y, an isl'd with 'em, in whose Room the Monks of all is the month of the Monks olitud Cluny came afterwards, to whom the Ciftertians Thence had formerly succeeded in that Cloisfer.

9. The Congregation of Cluny was a famous to the Order of Monks institute in the Year 910 by Berno in France, where they have their princi; as, and pal Abbey. Of the Greatness whereof we may make an Estimate from it's being found Habit sufficient to afford Lodging to Pope Innocent 4, with 2 Patriarchs, 12 Cardinals, 2 Arch-Bito the shops, and 15 Bishops, &c. As also, at the Riches same time, to Lewis the Eleventh, with the Duke of Artois, and the Emperor Baldwin. We had first Monks of Cluny in the Monastry of Passey, and then Cistertians, and afterwards those of Cluny again: With whom also the Abbey of Rewls-cross, or Corfraguel was planted.

10. Norbert Arch-Bishop of Maydenburg did institute the Order of Premontre in a place of that Name within the Diocese of Laon in France, about the Year 1120. The Monks pretend it was so called, because the place was Divina Revelatione Præmonstratum. They were under the Rule of S. Augustine, and had five Convents in Scotland, viz. the Abbeys of Tungland, Holywood, Dryburgh, Fern, and the Priory of Whitborn.

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11. The Mendicants, or Begging Friers, arofe Tent in the Twelfth Century. Who were not as der the Monks confin'd to their Cloisters, but allowed to go about for their Living; and to Preach in the Neighbouring Paroches. They are branch'd into the five Orders of Carmelites, Dominicans, Franciscans, Augustinians or the Hermites of S. Augustine, and the Trinity Friers Or Mathurins.

12. The Carmelites were several Western Pilgrims pick'd up by the Patriarch of Antioch, and plac'd in a Monastry upon Mount Carmel, about the Year 1160, while Alexander 3 was called bis Holine's at Rome. They boaft themselves to be the Successors of Elias, because Carmel was formerly the Retreat and Residence of that Prophet. Being expelled thence in the Year 1238, they came into Europe; and in King Alexander 2d's time, to Scotland, where they had their Convents at Dumbar, Linlith. gow, Tillilum, Queensferry, Aberdeen, Irving, and Banf. This Order was called, the White Friers; and hath furnished many Bishops, Preachers, and Learned Men to the Romish Church.

13. The Dominicans, or Black Friers, had S. Dominick de Guzman a Spaniard, who contrived the Inquisition, for their Founder; and were called the Preachers, from their Preaching down Herefy, as Roman Catholicks term the Protestant Doctrine. In France they went under the Name of Facobines, because their first Convent was in S. James's Street of Paris. This Order is said to have been confirm'd by Inno-

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at al. 14. The Order of Franciscans or the Gray d to Friers, called also the Minor Bretbren were in-They stituted by S. Francis an Italian, about the Year elites, 1208, approven by Pope Innocent 3, and conthe firm'd by Honorius 3. This S. Francis had been Friers a dissolute Me chant in his Youth, who upon the Wakening of his Conscience, put himself estern under the greatest Austerities; and turn'd so stiocb, compassionate, that he cou'd not find in his armel, Heart to kill a Loufe. He endeavoured by 3 was Preaching to Beafts, and Teaching Birds their them- Catechism, and Sheep to Bleat out their Cacause nonical Hours, and such like Holy Feats, to dence treasure up a Stock of Merit in the Bank of his in the Fraternity. He prescribed extreme Poverty to nd in his Followers, that they shou'd go bare-footed, where girt with a Rope about their Wasts, and beg inlith- their daily Bread. They were not allowed to Irving, handle Money, or to possess any thing in Property, and scarce could call their Wearing Clothes their own. To gain Credit to this Order, a Story was vented, That a matter of two Years before S. Francis's Death, a Seraphim, as he was Fasting and Praying, Imprinted upon the several parts of his Body, the same Marks and Wounds our Saviour bore upon the Cross.

15. We had no Dominicans or Franciscans in Scotland, till a Sample of 'em came from France with Bishop Malwoisin in the Year 1219. But they foon got into a mighty Esteem with the People, invaded the Pulpits, and leffen'd the Reputation of the Priests, Both these Orders

had

had their Convents at Edinburgh, Glasgow, Air, and p Perth, Dundee, Stirling, Aberdeen, Elgine, Stiplace Andrews, Haddingtoun, Dumfreis and Innerkeith. These ing. The Franciscans also had their Houses at Roxburgh, and Lanerick; and the Dominicans at prove Wigtoun, Montroje, Invernes, Jedburgh, Linlithgew, boasts Kingborn, Dysert, Forres and Selkirk. These Black For t and Gray Friers had the Ground Annuals with. Math in Burgh, for their Patrimony: And all their warn Possessions within the Jurisdiction of Edinburgh Prince were disposed to that Good Town by Queen Rede Mary's Charter dated March 13.1566, and ratifie sh Sl. ed by King Charles the First in the Year 1636. Jangi The Franciscans are subdivided into Minims, of the Recolets, Capuchins, &c. The first assum'd the Minis Name of Minims out of Humility. The Reco-Such lets were so called from Mansions that Clement and 7. caus'd to be given them for receiving such as 18. had the Spirit of Recollection. Capuchins bor- the Y row their Name from their long Hood or of Bacowl, which is sow'd to their Habit, and ame hangs generally down their back. They work Livel

neither Shirts, nor Breeches.

16. The Augustinians or Regular Canons polynake sels'd the Abbeys of Jedburgh, Halyroodhouse, them Cambuskenneth, Inchassray, Scoon, and the Priories of Holycross, S. Mary Isle, S. Andrews, May, Pittenweem, Monimusk, Restenneth, Straphillan, Blantyre, Portmolock, and Lochtay. There slowers, wet, of Ross Shire, from which the Town got that Name. The Difference betwixt Monks and Regular Canons consisted in this, that the latter took the Charge of Parish Churches, that

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An and perform'd Ecclesiastical Functions in any St place; whereas the former seldom discharg'd keith these Offices out of their Monastries.

fes at 17. The Order of the Trinity Friers was apans at proven and confirm'd by Pope Innocent 3, and bgew, poasts not to be of Man's making, but of God's. Black For the Popish Writers tell us, that S. John of with Matha, first Patriarch of the Order, was their varn'd by God in a Vision to set it up. Their burgh Principle and Work was, to beg Alms for the Queen Redemption of Christian Captives from Turkratifi in Slavery: Which they us'd to transmit to 1636 Tangier, and other places by the Hands of one linims, of their Number. Their Benefices were called 'd the Ministries, and the Prelate was called Minister: Reco. Such were the Ministers of Fale, Peebles, Scot-lement and-well, and the Trinity Friers of Aberdeen. uch as 18. The Society of Jesuites was founded in

s bor the Year 1534 by Ignatius Layola, a Gentleman od or of Biscay, who finding himself disabled and ame of both his Legs, did cast about to gain a word Livelyhood by Devotion. This Order of Men nath obtain'd such Priviledges from Rome, as makes it terrible to all others. They convert dbouse, themselves into all shapes, intrude into all Prio Courts, and make it their business to wheedle May, eminent Schollars into their Society. Wherebillan, by they are able to maintain their vast Authoe flou- rity, and to support the Papal Chair. But chanery yet, for all their Politick Arts and Skill, have not that had the Mortification to be banished one time s and or other, out of most of the Courts of Euat the rope. The Reformation came on before irches, that fly Generation of Men got any House over

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over their Heads in Scotland. They were be ginning to brood under the late King James in a Colledge, in the Abbey of Halyroodboule But were turn'd out of that Nest, at the Revol to the lution; and we hope shall never return, or he rity, publickly seen in Scotland, except in Effigie.

19. The Jesuites, Carmelites, and Capuchin 19. The Jesuites, Carmelites, and Capuchin ed fr Friers, are now us'd to be sent as Missiona plici ries to Preach Conversion to those in Turkey period Persia, Georgia, Africa, East Indies, Congo, &c And they ordinarly introduce themselves under and

the Character of Physicians.

of Monks and Monastries; and explain't ple, the several Orders they've been pleas'd to mo lifter del themselves into: It will not I hope, be were thought a miss, to describe their Regular Poper to

lity.

21. A shaven Crown was the Badge of al thes, Monks, whereby they pretended to fignify was I their firm Expectation of a Crown of Eterna rival Life; and that they had renounc'd the World p ver That they might not be at liberty to forfake ting their Profession when they pleas'd, they mad ot convert their Admission; whereof some were mpti peculiar to every particular Religious Order to their common to all Orders are the their others common to all Orders, as the three rece Vows of Chastity, Poverty, and Obedience Church The first hath given occasion to much Lewd acy ness and Uncleanness committed by Persons in the who found themselves uncapable of keeping 23.
to their rash Vow of Chastity; whereby not mong only Incontinence, but even Marriage is excluded; which is strange to see in a Church (1)

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that esteems Marriage a Sacrament. The second hath tempted People to misplace their Liberality on a Pack of Idle Abbey-Lubbers : to the Robbing of the Real Poor of that Charity, which is their due. As to the Vow of Obedience, how many Villanies have proceeded from their conceiving themselves bound implicitely to obey the Commands of their Su-

22. Monks liv'd at first by their Industry. under and some private Alms, the People gave them for the Help of their Prayers. They came to riginal the Parish Church with the rest of the Peo-olain's ple, and sometimes sent for a Priest to admi-no mo nister the Sacraments to them. At length they were allow'd to have one of their own Num-ar Po per to Officiate only in the Monastry; which wave them Occasion to have particular Church ave them Occasion to have particular Chur of all thes, and make a kind of Regular Clergy. It fignify was Pope Gregory permitted them to celebrate rivate Mass in the Monastry; which turn'd World o very good Account to the Monks, in Attraforsake ting much Charity from the People. But y made of content with all this, they procur'd Exne were imptions from the Episcopal Jurisdiction.
Order lobert Bishop of S. Andrews, for Instance, (a)
three rece & Consilio D. Regus, exeem'd all the
chief churches and Chappels belonging to the Ablewd acy of Coldinghame from their Dependance
persons in the Bishop.

keeping 23. Monks had a Subordination of Officers eby not mong 'em, The chief was called Abbot, in

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Church (a) Amo 1127.

whom the chief Care and Management of the Monastry, was lodg'd. One Monastry cou'd not have two Abbots; But I find there hath been many forts of 'em; Such as, Regular Al bots, who were Monks; and Secular, or La Abbots, or Abbots in Commendam, who convers' with the World, and by Dispensation as to their Age, and other Qualities, succeeded to the Rights of Regular Abbots. The Diffe rence betwixt Abbots Commendatory, and Regu lar, is, That the former enjoy but a Third the Revenues of their Abbeys, Two Parts be ing allotted for the Maintenance of the Monk and Charges of the Monastry; whereas the whole was at the others Disposal. Anoth Speciality in the Commendatory Abbot is the that tho he be Substitute in the Right of the Regular Abbot, yet the Monks are not subje to him in what concerns the Rule of the Institution, or Monastical Discipline: As which, they are only to obey the Prior, duri the time that the Abbey is in Commendam; th is, during the Vacancy of the Abbots Office But then the Commendatory takes upon hi to put in, and turn out the Priors. The Di nity of an ordinary Abbot, is next to that a Bishop. But some Heads of Monastri that they might be Independent of the Bisho were freed from their Jurisdiction, and the fore called Abbates Exempti. Another ki there was of Sovereign Mitred Abbots, the were not only subject to no Diocesan, also invested with Episcopal Power: In whereof, the use of a Mitre and other Epile

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pal Ornaments were indulg'd them. But Pontius Abbot of Cluny, not content to stand upon a Level with Bishops, did, in a Synod held at Rome in the Year 1117, assume (as 'twere to vie with the Pope) the Boasted Title of Abbot, of Abbots. The Abbates Exempts had Jurisdiction over the Monks, to Discipline and punish them when they transgress'd the Rules of the Order, or committed a Crime: But Abbots that were subject to the Bishop, behov'd to deliver up their Delinquents to be punished by him, or his Arch-Deacon.

24. Tho the Abbot be Head of his own Monastry: Yet several Monastries were under one Provincial; without whose leave, as Superior of all the Religious Houses in his Province, no Monk cou'd thift his Monastry. But sometimes the Monks, for a just, or plaufible Cause, as upon the Account of Health. or the like, were translated from one Monaftry to another; which the Abbot could authorife, if the Changeling desir'd to pass into a stricter Order: But if into one of the like strictness, he behov'd to do it with Consent of the Convent. And if a Monk, finding himfelf uneafy under the Rigour and Severity of the Rules of his Order, was defirous to flie to one under milder and less rigid Discipline, the Pope himself behov'd to be consulted in the matter, and give way to it.

Abbot, the Prior held the chief Rank; to whom the Sub-Prior was Subordinate, who acted as Prior in his absence, and during a Va-

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cancy of the Priors Office : As the Prior goe vern'd the Abbey in the Circumstances of the Abbots absence, and a Vacancy of the Abbatial See. These were called Claustral Priors. to diffinguish them from Conventual Priors, who were Dignitaries; whereas the others were not. A Conventual Prior is one that presides ever a Party of Monks detach'd out of some Monastry, and settled in a distant place, to negotiate the Affairs of the Monaltry, and look after their remote Lands, and Rents, The House where they liv'd was term'd Cella, or Grangia, or Obedientia, as a Note of Distinction from the principal Monastry on which it depended. So the Priory of Urqubart in Murray, was a Cell belonging to Dumfermling; The Priory of Machline in Kile, depended on the Abbey of Melrofs; The Priory of S. Mary Isle in Galloway, upon the Abbey of Holyroodboufe; The Priories of Restennot in Angus, and Blantyre in Clid dale, were Cells pertaining to the Abbey of Jedburgh; Lesmahago in Clids-dale, and the Isle of May in the River of Forth, were Cells of Kelfo. The Church of the May us'd to be visited by Barren Women, in hopes to These Obedientiaries sometimes get Children. revolted from their Duty, and fet up for themfelves; which turn'd a Precedent for erecting Independent Priories. And these came at length to have inferior Priories depending upon them; As the Priories of Monimusk in Mar, Pittenweem and Portmollock in Fife, were Cells belonging to the Priory of S. Andrews. Many of thele Rural Priories having shaken off their Dependance,

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dance, and usurp'd an Exemption from the principal Abbey, or Priory, turn'd into Beneices, and were bestowed on Secular Priests, with Cura Animarum annex'd . Whence the Original of Simple Seculariz'd Priories is deriv'd. But yet in some places the Prior continued a Regular, and ferv'd the Cure by some Secular Ecclefialtick, as his Viccar. In these Churthes, where the Monks turn'd Secular Canons, Provost came sometimes in place of the Conentual Prior.

26. Some perhaps will expect here an Acount of Nuns. These, as well as the Monks. id monftroufly degenerate from their Primiive Institution. Brigida, or S. Bride, as they call er, is the first protes'd Nun that I read of in ur Countrey, who was descended of Honouable Parents in Caithnels, and retir'd from the World, and a great Estate to which she was orn, that she might be devoted to the Service God. She died and was interr'd at Aberney: And feveral Virgins copying after her, a May ave themselves up to Devotion, and a solitary pes to ife. But these, without taking on Vows. times d preserve their Chastity more nicely, and themis fpotted, than later Nuns, who, like the ecting lonks, distinguished themselves by Orders, ules, Vows, and Habit: And in their Nune. length them! es had the different Offices of Abbess, Prioress, enweem c.

> 27. Waving the several Orders of Nuns in otland: They had their Convents in the Priies of Northberwick, Haddingtoun, Manwel, Idfream, Eccles, S, Bothan, &c. Those of 'em

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called

called the Gray Sifters had a House at Sheens near Edinburgh, another at Dundee, and a third at Aberdeen. I am inform'd, that 14 Monastries in Scotland were govern'd by Women. Coldinghame, before it was erected in a Priory for Monks, had been a Sanctuary of Virgins, famous in ancient History for cutting off their Nofes, and Lips, to preferve their Chaffity from the Danes. There were once Nuns in Lincluden, whom Archbald Earl of Douglass ex. pelled for violating their Chaffity; and their House was converted by him into a Collegian Church.

28. Fuller (a) informs, that Nuns were a numerous in England, as Monks and Friers Having, tho not so many Orders, more of the same Order. He instanceth in that of the Gilbertines, an Hermaphrodite Order, admit ting Men and Women under the same Roof In which, for 700 Brethren, there were 110 Sifters. My Author finds no Writer to have been of this Order: He conceives they too fuch pleasure in one anothers Company, the had no leifure to put forth Books. However the 20 Canon of the second Synod of Nie expresly provides against double Monastric that is, the allowing of Cloisters for Men an Women within the Circumference of one at contri the same Wall.

29. I shall now return from speaking Regular Benefices, to give some Account of the called Secular Benefices.

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⁽a) Church Hift. Lib. 6.

CHAP. III.

Ecclesiastical Offices divided inte Orders and Dignities. The 7 Orders of Door Keepers, Readers, Acolytes, and Exorcijis; Sub-Deacons, Deacons and Priests explain'd. As also the Dignities of Pope, Cardinals, Patriarchs, Primates, Metro. politans, Arch-Bishops, Bishops; Their Subalterns of Dean, Sub-Dean, Arch-Deacon, Chanter, Sub-Chanter, Chancellor, Thesaurer, Provosts, and Episcopal Chapters. Secular Benefices divided, 1. into those of Cure, and Sine-Cures. 2. Into Prelacies, and those belonging to the I ferior Clergy, Such as Parish Churches, Chapelries, and Altarages.

ESIDES the Ecclesiastical Function ons instituted by the Apostles; others were afterwards introduc'd into the Church by Humane and Ecclefiaftical Authority. The Romanists have contriv'd a Set of 'em, not so much for Edisication of the Faithful, as for establishing and Supporting their Spiritual Hierarchy: Which are of the usually distinguished into Orders, and Dignities.

2. Their Orders are seven, whereof some are called Minor, as Door Keepers, Readers, Acolytes

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lytes, and Exercists. Others go under the Designation of greater Orders, as Sub-Deacons, Deacons, and Priests. All invented to support the Sacrifice of the Mass; alluding to the abolished Ministration of the Priests and Levites, under the Old Testament. The Acolytes had the Charge of the Lights in the Temple. And the Work of the Exercist was to cast Devils out of Demoniacks, by the Imposition of Hands, and some Conjuring Words.

3. Dignity is either an Ecclesiastical Benefice with Jurisdiction, or quod babet nomen dignitatis cum prerogativa in choro & capitulo. The Dignities are those of Pope, Cardinals, Patriarchs, Primates, Metropolitans, Arch-bishops, Bishops; Their

Subalterns and Provofts.

4. The Pope, who is now arriv'd at the Pinacle of Ecclefiaftical Preferment, what by Fraud, and Force, and the Affistance of the Emperor Phocas, acquir'd the proud and lofty Titles of Christs Viccar, Universal Bishop, Head of the Church, Supreme and Infallible Judge of all Controversies in Religion. When Popes began to fet up for the Successors of S. Peter, they called their Estate Peter's Patrimony; and the Tribute pay'd them Peter-Pence. They pretend to derive a Right from Constantine the Great, not only to the Spiritual Dominion over the Church; but also to the Temporal Sovereignty of all Italy; and that the Seat of the Empire was remov'd to Constantinople, to give way to the Pontifical Power in Italy: But the more Judicious of the Romanists are justly asham'd to own this Fiction. I confess it is mention'd in the

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(25) he Decretals: (a) But so different Accounts are handed about concerning it, that the fame mighty liable to the Suspicion of an Impoture, Nay, if we'll only confider the subsequent State of Italy, and the Western Empire. we hall find it no hard matter to dash and eat down this Papal Pretence. For is it not nanifest, that constantine, before his Death. livided his Empire among his three Sons, aloting to the eldest the Western parts, to the second the East, and the Countrey interiacent nitatis to the youngest: And that Constantine's Successors continued to Iway the Scepter in the East, till the Irruption of the Goths and Vandals. Yet giving, not granting, that Donative had been true Deed, it could not have subsisted in Law: Since that Prince had only the Admi-nistration of the Imperial Revenue; without of the any Power to dilapidate, or throw it away.

5. Cardinals at first, were only Priests or Head Deacons of the Church of Rome: So called e of all from their prefiding over some Cardinal or principal Churches, But at present they have got above Arch-Bishops, and are mightily greaten'd, and considerable in the View of the World, through their being Senators of the Popes Confistory, and the only Persons who

can elect or be chosen Pope.

6. There were five Patriarchs, as those of Rome, Constantinople, Alexandria, Antioch and Feusalem. Which five Patriarchs a Popish Writer b) fancies to be prefigured in the fourth

⁽a) C. Constantinus 14. Dift. 96. (b) Lyra in Cap. 4. Apocalyps, S. Joan.

Chapter of the Revelation, by one fitting up a Throne, and four Beafts full of Eyes before an behind, round about him. All Patriarchs are Pri mates, but all Primates are not Patriarch Tho upon the matter their Authority is mud what the same.

7. Metropolitans or Arch-Bishops preside over whole Provinces, differing only in this that the Metropolitan was look'd on as the more honourable Arch-Bishop; for that hi Seat was in some Metropolitan City. The were at first see over Bishops, for the sake of good Order, that the Churches scatter'd b Persecution might be the more conveniently taken care of. But this introducing of Inequa lity among Bishops, did pave the way to Am bitious Spirits for aspiring to greater and great er Degrees of Ecclefiastical Dignity. when Constantine the Great had reduc'd severa Provinces into one Diocese, Metropolitan were subjected to Patriarchs and Primates.

8. I find mention made of three kind of Bishops in the 77. Act of Q. Mary's 9. Parlia ment: The Bishop Elect, the Bishop Postulate and the Bishop Consecrate. A Bishop Elect is he who is Elected by the Chapter upon the King's Conge de'estire, but not yet Consecrate A Bishop Postulate, was not Elected, but only These Bishops Postulate were not long in Scotland. The Pastoral Staff, Mitre and Ring are the Symbols of the Episcopa They tell us, that the Ring is given to the Bishop tanquam Sponso Ecclesiæ; that the Forked Mitre implies the Knowledge of both the

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fore an he Old and New Testaments to be the Ornas are Priment of his Head, and that he should be Fear'd iarch and had in Reverence by the People; and that s muc the Staff is crooked, to intimate how the Stube orn ought to be drawn into the Bosom of the reside Church, and gently reduc'd to their Duty. Bis n this hops, in time of Popery, had both a Spiritual and as the Civil Jurisdiction within their own Diocy; nat hi and each had their own Official, to judge in Il Matters of Tithes, Minors, Orphans, and poor Widows; and to confirm Testaments. Yea the Spiritual Judge of old was in use to Repledge Kirk-men from the Parliament. But Bishops were depriv'd of their Civil Jurisdictie on at the Reformation: And Queen Mary appointed Commisars in the Room of Officials.

9. The Bishops Parish Church is term'd a Gathedral, from the Chair that stands there for him. In every Cathedral there are plac'd in a Collegiate way, some Ganons or Prebendaries with a Dean over them: And these made up the Bishops Chapter or Council, called Capitulum in the Canon Law, as being the Little. or Inferior Head of the Diocy. The Prebends fate upon Benches in the Quire for performing of Divine Service, and derive their Name either a Præbendo Auxilium, aut Consilium Episcopo, vel Decano; which was the use they were defign'd for: Or from Prebend, which fignifies that Portion every Canon receives for his Maintenance out of the Church-Patrimony; for which he was Recorded in Canone, that is, the Matricular Book of the Chapter. dignified Members of the Chapter were distinguished

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guished by the Titles of Dean, Arch-Deacen, did fin

Chanter, Chancellor, and Thefaurer.

10. The Dean, is thought to have succeed that p ed in place of the Archipresbyter. But these Primic were sometimes distinct Offices; as in the Reg Colledge Church of Dumbar, the Dean and bers o Arch-Priest had their several Prebends. The miceria Dean is called Decanus in the Canon Law, it a ce from his presiding over ten Prebends: But that us'd t Number is not observ'd; there being more, much or fewer, Canons, according to the different Chant Circumstances of Foundations.

11. The Areb-Deacon is in effect the Bishops third racter Viccar, and alter Episcopi Oculus. His Office Cereu was to examine fuch as were presented to the But I Bishop, to put them in Possession of their Benefice after Admission, to visit the Diocy in the Bishops absence, and to be a Check upon the Lives, and Manners of the Clergy. Arch Deacons were generally thought inferior to Cathedral Deans. But whatever be as to these Deans, the Arch Deacon had Rural Deans under him, that is Countrey Parsons, appointed to give Induction for him, when living at a distance, and to decide the Differences of the Clergy. Sir James Dalrymple (a) observes the Arch-Deacon of Lothian to have been above any Dean on either fide of Forth. The Arch-Deaconry of Lothian was gifted to the Town of Edinburgh by King James 6. upon the Dimission of Alexander Bethun the last Arch-Deacon thereof, April 4, 1584, and annex'd to their Colledge.

⁽ a) Collections concerning the Scottish History, Pag. 295. 12. Whereas

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12. Whereas at first the Priests and Deacons did fing Mass in Cathedral Churches, Pope Gregory the Great instituted a School of Singers for eed that purpose. The Rector whereof was called hese Primicerius or the Chanter. His Business was the Regulate the Musick, and keep all the Memand bers of the Choir in Tune, Many take Pri-The micerius for a Compound Word; some deriving Law, a cerie, i. e. ceratis tabulis, upon which they that us'd to write of old, as if Primicerius were as nore, much as Scriptur & Ordine primus; others fancy the erent Chanter to have been so called, in respect he was Præpositus Ceris, i. e. Libris Ritualibus; a shops third fort will have him to go under the Cha-Office racter of Primicerius, from his carrying Primum o the Gereum, the first Taper before the Bishop: r Be. But I chuse rather to think, that Primicerius cy in a simple Word, signifying the first or chief upon any Order, or Society; for Peter us'd to be alled Primicerius Apostolorum, and Stephen Priicerius Martyrum. The SubeChanter was the hanters Depute, who officiated for him in s absence. Many Persons also mortified Reenues for the Maintenance of one, or more riefts, to fay daily Mass for their own Souls. for the Souls of their Friends at some Altar. in some Chappel of these Cathedral Chure es: Which Office was called a Chantery. nd when the Service was to be perform'd at Altar, the Priests Sallary was term'd Altage: However the Founders did not so ingross e Devotion of these Priests, but that they d other Casual Emoluments of Obits, Proces-Pence, and the like. Obit is the Office for the

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the Dead, which us'd to be perform'd for on some little time after his Breath was out. For celebrating whereof the Defunct either less Legacy, or his Friends and Posterity gave some Gratuity. It was also called Dirge, from the Words Dirige nos Domine in the first Antipho of the Office.

12. The Chancellor was Secretary to the

Chapter, and kept the Seal thereof.

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Overfight of the Thefaury, and all other thin belonging to the Church. Under whom the was a Sacrift, or Vestry Keeper, who discharg the drudging part of the Employ.

rs. But after all, these Dignitaries are gulated in their Jurisdiction and Precedency the special Foundations or Local Custom.

Canons, or Prebends, who had no other for cial Name. Some Prebends were called Canici actu, as having Right to Vote in the Chater; others Canonici in berba, or Canonici expectantes, for that they had a Stall in the Choir, and a Right to the first vacant Prebends but no Vote in the Chapter. For albeit I nesses cannot be effectually confered, best they vake: (a) A Prebend may be secure to one who is already chosen a Canon. (In some Cathedral Chapters there are Laick Honorary Canons; and some of these Print who had been either complimented with the

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⁽²⁾ C. 2. Extr. de Concess. Præbend. (b) C. Relatun Præbend. Bongeus de Benefic, ad Verbum Militia, C. 4. 5. N. 14.

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or of Dignity for Services done or to be done to the Church; or had referv'd it to themselves in Churches founded or indowed by them. So, he Emperor is a Prebend in the Lateran Church of Rome, and in the Churches of Coogn, and dix la Chapelle. The French King in he Churches of S. Hilary in Poitiers, and S. to the Martin in Tours. And Alphonfus King of Spein was a Prebend of the Abbey of Cluny. eems a fingular Constitution in the Church of Lions, that the Office of Prebend there can only be dispos'd of in favours of one of the Scharg Nobility. And we find a Matter of 74 Canons o have been in that Church in the Year 1245. are mong whom there was an Emperors Son, dency pine Kings, fourteen Dukes, thirty Earls, and om. wenty Lords. (a)

17. The Dean and Chapter elected the Bither hop, (b) affisted in some of the Episcopal ed Car Functions, and concurr'd in the Administratihe Chapter of Affairs of the Diocy. Only the Arch-Canon Bishop of S. Andrews had no Chapter within the Memory of Man, but the consent of the Preber Prior of S. Andrews and his Convent, was in the Memory of Man, but the content of the Prior of S. Andrews and his Convent, was in the Medical flead of one. Whereof possibly the Reason do, best has been, because the Arch-Bishop of S. Andrews having founded the Priory out of his own Benefice, did thereby extinguish the Chapter-Churches, and annex them to the Priory. But that Priory being suppress, and annex of the Priory. with therested in a Temporal Lordship in favours of

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Relatun (a) Chopin de Sacra Politia, Pag. 64. Thomassin la Disci-C. 4. 5. pline del Eglise, Part. 4. Lib. 2. Chap. 37, N. 1. (b) Att 1. Parl, 22. 7. 6.

Ludovick Duke of Lennox, a new extraordinary Chapter was appointed for Election of the Bishop, and an ordinary one for Administration of Affairs of the Diocy. Two fuch Chapter were also allotted to the See of Glagow. (a) But the Priory of S. Andrews was annex'd to the Arch-Bishoprick by King Charles the First.

18. Having done with Bilbops and their Sub alterns; The Dignity of Provofts fall next to be Our Ecclesiastick Provosts are the consider'd. same with the Prapositi in the Canon Law Whereof fome were Governours of Colledges instituted for instructing of Youth: As the Provost of the old Colledge of S. Andrews Others had the Inspection, and Oversight of Collegiate Churches, which had been built for Divine Service, and Singing of Mass, especial ly for the Souls of their Founders and Patrons or their Friends. When the Persons to be pray for are dead, the Narrative of the Foundation Charter runs ordinarly pro anima of fuch a one; and if alive, it bears pro salute. But ye this Distinction is not always observ'd. Collegiate Church confisted of Prebends of Canons, who had their several Degrees of Stalls, where they fate for more orderly fing ing their parts of Musick; and with their Provost made up the Chapter or Convent. But dis. the Collegiate Church of Dumbar, by the Found dation, did confift of a Dean as the Head, an Arch Priest, and the eight simple Canons of Dumbar Pincartoun, Spot, Beltoun, Petcoks, Lintoun, Duni,

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⁽a) Alt 2. Parl. 22. 7. 6.

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inar and Chirnside. It was in Charles the Great's time, that Cathedral and Collegiate Chapters were instituted, and settled. (a) By the change of the Collegiate Persons, the Colledge s not chang'd, but remaineth the same. (b) Nay, the Collegiate Body might subfift in one Member: (c) Altho it cou'd not be originaly constitute without three Persons at least. (d) The common cause, and end, and interest. loth occasion Collegiate Persons to be consider'd not fingly, but as one Body, for the time bygone, prefent, and to come : So that what is resting to a Collegiate Body, is not due to every Member; nor is every one liable for the Uniersities Debt. (e) If no Defence be made; the common Good is seiz'd on, and fold. (f) But if the Colledge come to be dissolv'd, the ommon Good may be lawfully shar'd among the several Members: (g) That is, if by their Contribution it came to the Colledge. vise it should return to the Founders, or to heir Heirs. (b) I shall afterwards shew, why Popilh Benefices were not so dispos'd of at he general Dissolution of the Collegiate Borees of dies they belong'd to. (i)

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⁽a) Thomassin, Ibid Lib. 4. Chap. 28. N. 10. (b) 1.7. 2. ff. Qued cujusque Universitatis nomine, 1. 77. ff. de Judient. But dis. (c) d. l. 7. S. 2. (d) l. 85. ff. de Verb. Signif. Arg. 40. 9. 3. cod. (e) d. l. 7. S. I. ff. Qued cujusque Univ. e Found om. l. 6. S. 1. ff. de Divis. Rerum. (f) l. 1. \$ 2. ff. Quod jusque Univ. Nom: 1: 8: cod. (g) 1: 3: pr: ff. de Collegiis Illiis. (h) Greg: Tholof: Synt: Jur. p. 2: 1; 15: Cap: 32: N: n, Duns, 1. 6 Segg. (i) vid: Chap. 5: N: 26.

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19. Secular Benefices may be divided, 1. into Benefices of Cure, and those without Cure, commonly called Sine-Cures. 2. Into Prelacies, and such as pertain to the inferior Clergy. I must here add to what hath been faid concerning Prelacies and Dignities; That tis presently under Debate before the Lords, (a) whether an Arch-Deacon be a Prelate. The Reasons alledg'd for his being a Prelate 1. By the Nature of the Office prack aliis. & capitulo, vel ejus parti. 2. The Acts of Parliament, particularly in K. James the Sixth's time, after the Restoration of Episcopacy, allowing Tacks by Bishops and other Prelates, import, that Arch-Deacons come une der the Denomination of Prelates: Since the Popish Offices of Abbots, Priors, and the like were extinct, and unlawful at that time. out of Modesty I shall leave the Point to the Decision of the Bench, where it lies at Avisan. dum; and content my felf to notice, that some Prelates, as Provofis of Collegiate Churches, have this of the Nature of inferior Beneficiaries, that they cannot do effectual Deeds without the Patrons confent, as well as the Chapters: (b) And in some respects all benefic'd Persons are confider'd as Prelates, viz. That they may have Heirs, and Heirship Moveable. (6)

20. The Priests or under Clergy, were either dispos'd into Parish Churches, or Chappel

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⁽a) In the case of Sinclair of Barack against Sinclair of Southdown and the Earl of Broadalbin; (b) vid; infr: Chap. 10; Sect. 1; N: 8: (c) vid; infr; Chap: 9: N: 2.

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or in Chappels of Cathedral, or Collegiate Churches. The Priests, who had Fees for singing of Mass in these Chappels, or at such Altars, and made also some Hand with the Casualities of Obits, and Procession-Pence, have been already spoke to: The Nature of Parish Churches, and Chappelries, remain to

be cleared up.

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21. Parish Churches were either distina Benefices, or united to other Benefices. Vicarages, and Menfal or Patrimonial Churches were united to other Benefices. Common Churches, and those under Patronage, were posses'd as separate Benefices. For the better understanding of these things, it is proper to notice, that the Bishop, with his Chapter, liv'd once in common upon the Revenue of the Bishoprick, which consisted much in Parish Churches. But about the Twelfth Century, conveniency requiring a Division; some part of it was set off for the common use of the Members of the Chapter, referving the rest for the Bishops own Maintenance. Hence proceeded the Distinction of Mensal and common Churches.

a part of his own Patrimony or Benefice; To the Rents whereof he had Right as Parson or Titular: And the Minister admitted by him, as Vicar or Stipendiary, got only some year-y Portion or Duty out of the Rents, or so nuch Money for his Maintenance, as the Binop and he agreed for. These Ministers of

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Mensal Churches, in time of Prelacy, depended for much upon the Bishop, that the Commission could not modifie Stipends for them, in the Terms of the Act of Parliament 1633. But since the Revolution, they had access to pursue for Modifications and Localities, as well as other Ministers: Being always obliged to cite the Officers of State for the Kings Interest. However, in regard the Tithes of such Parishes were in the Hands of the Sovereign by the Suppression of Bishops, the Commission used no further to interpose their Authority, than by a Recommendation to the Thesaury for a Gift in savours of the Minister, equivalent to the legal Stipend.

23. Common Churches were these, in the planting whereof with Incumbents, the Members of the Chapters of Cathedral and Colle-

giate Churches had a joint Interest.

24. Churches under Patronage, are to be treated of in the next Chapter: Where the Rife, Nature, and Progress of Patronage is

explain'd.

Capella; but whether that owe it's Original to Capella; but whether that owe it's Original to Capra, because the Tabernacle was cover'd with Curtains of Goats Hair; or to Capana, quia paucos capit; or to Capa S. Martini Bishop of Tours, which the French Kings of old were wont to carry with them as a Holy Relick in their Warlick Expeditions; or if it be so called a capiendo Laicos: I shall not be positive, because I do not know, nor is it much material to know it. This is certain, that there were three

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Free Chappels, and Private Chappels.

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26. Chappels of Ease, arose much upon the like occasion as Synagogues among the Jews. For as they had one Temple at Ferufalem, to which they reforted thrice a Year, at the folemn Feasts of the Passover, Pentecost, and Tabernacles, for a Profession of the Unity of their Faith and Worship; and that the Exercises of Religious Duties might not in the Interval be quite neglected, nor the Knowledge of the Law loft to the Vulgar; and in consideration of those whom Age, or Habit of Body, or other Circumstances wou'd not permit to visit ferusalem; were indulg'd the use of Synagogues in their Cities, and Villages, where the people met upon the Sabbath for publick Prayer, and to hear the Law read: So when Ministerial Duties were first bounded by Parishes, these were very wide, and it being found uneafy for such as dwelt in the remoter parts, especially old and fickly pera fons, and Women with Child, to come up to the Church on all occasions, for partaking of the Ordinances; Chappels were built for their use, and thence called Chappels of Ease. These were ferv'd by some inferior Curate, main tain'd by the Rector of the Parish. But then the people were oblig'd to attend the Ordinances in the parochial Church, at the stated Festivals of Pasch, Whitsunday, Christmass and others. (a) The parochial Church was

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⁽a) C: si quis etiam 35: de Consecrat: Dist: 1.

also called the Baptismal, or Mother Church. For understanding the Reason of which Designation, we must remember, that the Rites of Baptism, in the primitive Times, were performed by Dipping in Rivers, when the Converts were many; and persons come to Years; and perhaps had not the conveniences that are now in use. But afterward that custom went off, and the Water of Baptism was put into Vessels called Fonts, from the original practice of Baptizing in Fountains; which were first erected in private Houses, and during the Fury of perfecution transplanted to Defarts. When Christianity got the countenance of civil Authoria ty, Baptisteries were built in Cathedral and principal Churches. For the Divine Service might be us'd in Rural Dependent Churches; the Right of Sepulture, and Baptism belong'd only to some principal ones, called therefore Baptismal Churches, or Ecclesie Matrices, Mother Churches: Because in the Font of Baptilm, as it were in the Churches Womb, we are regenerated, or born Christians.

27. Free Chappels were not within the circumterence of any Parish, and had proper Endowments for their own Chaplains: Whole Bounds of Inspection were called Chappelries, or Chaplainries. They had the same powers within their Chappelries, that the Parsons had within the precincts of their Parishes; And therefore were called Parochial Chappels, to distinguish them from others, that were only

defign'd for Prayer and Preaching.

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28. Private or Secular Chappels are those built and endowed by Princes and great Men, in or near their own Houses, for the use of their Families. Some of these private Chappels are called Oratories, as being only design'd to pray in; others are built adjoining to a Church, as a part of the same, which the proprietar keeps for a peculiar burying place. The Founders and Endowers of these private Chappels could, at their pleasure, have recalled the Foundations, and inverted the same to their own private use. (a) But this priviledge was not competent to their Heirs. (b)

(a) Bengaus de Beneficiis ad Verba cum suo Reditu, Cap. 2: Part 1: §: 1: N: 16. (b) Ibid. Panormitan: in Cap: ad hac de Relig: Dom: Arg: Nov: 131: Cap: 10.

CHAP. IV.

An Account of the Rife, Nature, and Progress of Patronage.

HEN Patronage was introduc'd into the Church, we
don't precisely know:
This much is certain, that
there was no mention on't
in the primitive, and purest times of Christianity. During the first Three Centuries, the
devouter part of Mankind appear'd mighty
forward to signalize themselves by extraordinary

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nary Acts of Piety and Charity. Many sold their Estates for the maintainance of their Ministers, and relief of the poor. But as Men began to slack their Hand in point of Liberality to the Church; the politick of complimenting the Founder or Benefactor of an Ecclesiastick Erection with the Chining Title, and tempting priviledges of Patron, was contrived for reviving and keeping up the wonted Fervour. Which priviledges were introduced by the Canons of the Church, Rescripts of Popes, and Constitutions of Princes, not all at once, but by Degrees. (a)

2. The Patron had a splendid Seat and Burial place in the Church; a Right of precedency among the Clergy, in solemn processions, Visitations, and the like; his Name and Arms were engraven upon the Entry, or Walls of the Church, and upon the Bells, Chalices, and other Utensils; and himself was particularly minded in the publick prayers of the

Church. (b)

3. Patrons had the Disposal and Application of the Fruits of the vacant Benefice. (c) Which was taken from them by the 20 AH I Seß. Parl. 1644, and stated in the Presbytery and Parish. Since the Rescinding of which AA, the Parliament have taken to themselves, to order the Application of vacant Stipends to

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⁽a) Fr: de Roye ad Tit: de Jure Patronat: Prolegom: Cap: 2: (b) Idem de Juribus Honorificis in Ecclesia, Lib: 2: C: 3: Park on Patronage, Sect: 2: (c) C: in quibusdam 12. Extr: de Pænis: De Roye ad Tit: de Jure Patron: Proleg: C: 34.

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pious Uses. (a) Sometimes again the Synod simpower'd to collect, and to make the Application with consent of the Heretors. (b) But now Protestant Patrons have the power of applying vacant Stipends, except those in the Synod of Argyle, to pious Uses within the Patish: Which even such as are Popish may do, by advice and appointment of the Presbytrie. (c)

4. Patrons had also some indirect Interest in their Benefices, where the Ministers had modified Sripends within the worth of their Benefices. From whom the Patron at his prefenting them us'd to procure Tacks in a confident Person's name, to his own behoof, for payment of the accustomed Stipend; Whereby he carried the Superplus profit of the Benefice. and the Patronage resolved in a Title of the Tithes. This was not quarrelled as a Ssmoniacal Paction, or Dilapidation: (a) But any condition made with the Patron, whereby the Intrant did not reserve to himself a sufficient Maintenance, answerable to the State of the Benefice, was accounted Simoniacal, and probable by the Parties Oath. (e) Albeit Regu. lariter nemo tenetur jurare in suam turpitudinem. Patrons have now Right by Law, to the Excresce of the Tithes of the Parish not affected with

⁽a) Act 52. Seff: 1. Parl: 1. Ch: 2. Act 18. Parl: 1. Ja: 7. Act 23. Seff: 2. Parl: W. and M. (b) Act 24. Seff: 2. Parl: W. and M. (c) Act 23. Ibid. (d) Act 1. Parl: 21. Ja: 6. Act 9. Parl. 1. Seff: 1. Ch: 2. Stair Instit: Lib: 2. Tit: 8. § 35. (e) D. Act 1. Parl: 21:

civil Titles, after the Minister is provided with to be

a legal Stipend. (a)

5. The Church was to fix an Aliment upon the Patron, if reduc'd to poverty: (b) Ever night as by the civil Law manumitted Slaves were bound to maintain their former Masters, that had not otherwise whereupon to live. (c) Bu restitu this Point hath never been Sub Judice. (d)

6. No benefic'd person without consent of his Patron cou'd do any thing material, fuch as the granting of Fews, or fetting of Tacks for more than three years. But the Patron confenting thereto was not lyable in Warran

dice.

7. The main Priviledge that Patrons injoyed, was a power to prefent within a determined time an Incumbent to the Vacant Benefice: To whom, if a fit person, the Church be hov'd to give Collation or Institution. (1) In Popish times our Princes had the nomination to Bishopricks, and Abbacies; And the Pope (f) Other Kings who had had the provision. this Priviledge, failing to nominate within fix Months, the Pope got the free disposal of the Benefice; or he might refuse unfit persons presented, and put them to a new Nomination

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⁽a) Act 23. Seff: 2. Act 26. Seff: 4. Parl: W. and M. (b) C. nobis 25. Extr: de jure patronat: C. quicunque 16. Q.7. Duarm de S. Eccles: Minist: & Benef: lib: 5. cap: 4. Bengaus de Benefic: ad verba cum suo reditu, cap: 4. p. 1. S. S. N. 9. (c) l. 5. S. 19. ff. de agnosc. & Alend: liber (d) Stair Instit: lib; 2. Tit: 8. \$ 35. (e) C. decernimus 16. 2.7. C. illud de jure patronat: C. ex insinuatione Eod. (f) Att 125. Parl: 7. 3a: 5.

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d with to be expede within three Months. But our law own'd no jus devolutum in favours of the Even right have presented at all times. (a)

8. Mr. Selden (b) afferts, That Lay Patrons

s, that once challeng'd the Right of Collation or Inby restiture, which they usually reserved in the Joundations; And upon every Vacancy conf fent of ferr'd possession of the Glebe, and Tithes, Tacks Seasine. The late Bishop of Worcester (c) al-Patron ledges that some such thing was indeed aim'd arran at by Patrons, to keep the Clergy in a fole Dependance upon themselves, but never oboved lained: Tho the Practice is often complained mined of in the Canons of the Church. But Sir nefice: George M'kenzie (d) thinks that Patrons were th be in the Exercise of that priviledge, for some (e) Ages after Charles Martels Government : And nination that the Clause with us, referving to them Pope power to retain the Vacant Stipends of the no had Benefice, is a veftige of their old pretention,

9. Presentation to a Benefice before it vakofal of ed, was not allowed: (e) Except where the erfors Incumbent through Age and Bodily Infirmination ties was render'd incapable to ferve the Cure; In which case he us'd to get a Helper joyn'd to him. (†) Nor was a Patron found to

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⁽a) Act 85. Parl: 11. Ja. 3. (b) Hift: of Tithes chap: 6.N.3. (c) Eccles: cases relating to the Rights and Duties of he Parochial Clergy, pag: 162 and 163. (d) Observ: on the th Att I Parl: Ja: 6. (e) C. ult: Extr: de concess: Prebend: P'Epeisses de Benef: Eccles: Tom. 4. Tit: 3. N. 27. F. de Roye ad lit: de jure Patronat: Prolegom: cap: 23. (f) Carpzov: jus Conistor: lib: 1. tit: 2. def: 15. N. 7. 6 Segg:

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have power to grant a Presentation to one and to another after his decease. (a) For i he the Patron might substitute one person to the Incumbent, he might substitute an hun dred, and so exclude all his Successors. But in the Court of Rome, it is an ordinary thing to iffue forth feveral Bulls for one and the fame Benefice, even while it is full, called Gratia Expectative: which is a vile and abominable practice. No Ecclesiastick Patron cou'd pre fent himself to the Benefice. (b) Some require that the party presented shou'd have all the Canonical Qualities of a benefic'd person, from the very time that the Benefice vaked Others distinguish betwixt a Right of Patron age which by the Foundation carries power to present any sufficient person in general, and that whereby the Patron is tied up to one of fuch or fuch a Quality, or Circumstances thinking it necessary in the last Case, for the presented party to have the requisite Qualities when first the Vacancie commenc'd, and suffcient in the first Case, that he be qualified at the time of the presentation. (c)

in Scotland had but one Minister, who was under the influence of anothers Patronage too; But at length the more considerable have railed Funds of Stipend to second Ministers, part

^{(2) 24} January 1677. Stuart contra Nairn. (b) C. per nostras 26. Extr: de jure patronat D'Epoisses Ibid N. 25. Bengaus de Beneficiis ad verb: concessa cap. ult: N. 26 3. G. Tholosan: Syntag: part 2.lib:17. C. 4. N. 9. Zoes: ad Tit: X, de jure patronat: N. 33. (c) F, de Roye Ibid, cap: 26.

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v out of the common Good, and partly by he Contribution of the Inhabitants; Refering ordinarily in the Erection the Patronages o themselves. Which secures against the preences of the Patron of the first Minister. (a) But the Patronage and power of presenting a econd Minister, was found to accresce to the Patron of the first Minister; Albeit the second Ministers Stipend was a voluntary Contribuion of the Heretors: Seeing the same was established only by an Act of Presbytrie, which did not mention any Reservation of the paronage, or that the Contributers did protest for it, and there was nothing of custom or possession to instruct the meaning of parties. (b) When there are more Patrons to a Church than one, they prefent by turns. (c) And if one of three conjunct Patrons succeed to another, he must present twice, where the third presents but once. (d) Some alledge that by presenting Trind Vice, or the three last times, one of several conjunct Patrons acquires a preferable Right exclusive of the rest. with us, that doth only operate a possessory Right in a competition with other Patrons pro ed vice. without prejudice to the rest to declare their Right for the future. (f)

11. It hath been disputed, if a Protestant

⁽a) Stair Instit: lib: 2.tit: 8.\$.27. (b) November 18.1680. Town of Haddingtoun contra the Earl of Haddingtoun. (c) C. ult: de jure Patronat: in Clementin: D' Epeisses de Benef: Eccles: Tom 4. Tit. 3. N. 9. (d) Zoes: ad Tit. X. de jure Patronat: N. 54. (e) Vid: de Roye Ibid: cap. 16. (f) M'kenzies Observ: on the 7th. Act. Parl: 1. Ja: 6.

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Patron ought to be allowed to exerce his Right of Patronage in a Popish Country? 'Tis al ledg'd for the Affirmative, that Patronage not a personal, but a real Right, ordinarily an nex'd to Lands, and confequently should fol low them, without regard to the Quality of the perion. And besides, the Presentation but a Servitude upon the Benefice, and not Spiritual Title. (a) Nor doth the Presentation properly give the Benefice without Institution from the Church upon the Letters of Prefen. tation; And in that the Spirituality doth real ly confift. 2. The Church may refuse these presented if they be not qualified; So that the Patrons cannot, if they would, abuse their Right; Nor can the Church receive any prejudice, if the Ordinaries discharge their Duty.

These who are for excluding Patrons professing the Reformed Religion, from the Right of presenting to Popish Benefices, do back their Opinion with these Reasons. 1. Tho Patronage be not properly a thing Spiritual, it is at least mixt; or, as they say, quid spiritual ale annexum temporali. 2. Patronage is a Right whereof the due Exercise requires some personal Qualifications. Grant that the Bishop is free to accept, or reject him who is presented, and is Judge of his Capacity; that is not enough: For the Bishop can only judge of Desects that are known to him. And it may be the protessant Patron may present a very capable Man,

⁽a) Carpzov; jus consister: lib: 1,tit; 2. Def: 13. N. 5. & 6. but

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ut who may be under fecret Ingagements ith himself to ruine the Church. Protestant av patrons in France heretofore. (when Heericks as they call 'em were fuffer'd to injoy heir Estates) were allowed to depute fit erions to present for them to the Benefice of heir Patronage. But now the Ordinaries in all Right confer fuch Benefices, fo long as he Patrons make profession of the Reformed leligion. During which time the Right of atronage is dormant, and revives upon their eing reconcil'd to the Church. Patrons, if they be Protestants, are allowed o imploy the vacant Stipends for pious Uses vithin their respective Parishes: And if Popish, hat must be done by the advice and appointment of the Presbytrie. (a)

nent, Presentations were made to the Presbyrie, upon which, if admission was resus'd to
the party presented; The Patron might have
appeal'd to the Synod, and from them to the
General Assembly. (b) In time of Presacy,
when the Bishop would not give Collation to
the person named by the Patron, he might
have applyed to the Arch-bishop, and if he
gave no Redress, the next Remedy was to
procure Council Letters for charging the Ordinary to receive the party presented. But it
was a relevant Objection against his Admission,
that by a Simeniacal paction with the Patron,

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⁽a) Att 23. Seff: 2. Parl: W. & M. (b) Stair Instit: lib: 2.

he had not referv'd to himself a sufficient Main tainance. (a) Nor was the Bishop oblig'd to receive an Expectant, who was not an actual Minister: (b) Because non constat that such a

one is qualified.

13. By the Canon Law, if the Patron did not present within the legal space, there was allowed an orderly Gradation jure devolute from Inferiors to Superiors, up to the Pope But our Law gave the Pope no jus devolutum to the prejudice of the Soveraign. (c) The Patron not making use of his time, the right of presentation fell jure devoluto pro ed vice, to the Church; That is, to the Presbytry, when the Ecclesiastick Government lodg'd in the hands of Presbyters. (d) And to the Bi shop in time of Prelacy. (e) But that Term which patrons had for presenting did not run from the date of the Vacancy; but from the time that he came to know of it. (f) Not were private persons hinder'd from abridging the time, tho they cou'd not prolong it, by Transaction, or particular Clauses in the Foundation Charters. (g) I have sometimes obferv'd the jus devolutum, or Law of Laple provided and qualified in the Foundation Charter by a Clause establishing the right of presentation in favours of certain persons primo loco, and

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⁽a) Act 1. Parl: 21. Ja: 6. (b) Ibid: M'kenzie observ: m the 7th. Act Parl: 1. Ja: 6. (c) Act 85. Parl: 11. Ja: 34 (d) Act 115. Parl: 12. Ja: 6. (e) Act . Parl: 21. Ja 6 (f) C. quia diversitatem 5. in fin: Extr: de concess. prebend, 6 licet Magister 3. Extr: de Supplend: Neg: Pralat: Act 7. Parl. 1 Ja: 6. (g) De Roye Ibid; cap: 28.

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and allowing others to prefent, if thefe neglect to do it within fuch a time. The Reasons for introducing this jus devolutionis were, 1. To hinder a long Vacancy of the Benefice, which is prejudicial to the Church. (a) Nam interim pregem dominicum lupus Rapax invadere possit. (b) 2. The Rights of the Church might perish by long wanting an Administrator. Patron were left at Liberty to present when he thought fit, possibly he wou'd never do it, that he might alwise have the disposal, and application of the Fruits of the Benefice during the Vacancy. And farther, it feem'd to be the Interest of the Common-Wealth, so to restrict and tie up the Patron: As in the civil Law, the Heir institute neglecting to Implement the Defunct's Will within Year and Day, the Heretage falls to the Substitutes, or Co-heirs, or others honoured in Testament. (c) And a Mother neglecting to feek Tutors for her Children, is excluded from fucceeding to them in their Estate. (d)

14. If the Church refus d to admit a qualiled Minister presented by the Patron, he might
etain the Fruits of the Benefice in his hands.

(b) Not as if he cou'd appropriate the vacant
stipends to himself; since hat were a kind of
sacriledge: But only apply them to pious Uss. (f) Wherein Patrons have frequently been

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⁽a) C. quam sit 6. de Electione in 6. (b) C. ne pro deectu 41. Extr: de Electione. (c) Authent: hoc amplius C. e sidei commiss. (d) L. 2. S. 23. sf. ad Sctum Tertyll. c) Act 115. Parl: 12. Act 1. Parl: 21. Ja. 6. (f) M'kentie Observ: on the Act 7. Parl: 1. Ja; 6.

determined by Acts of Parliament. (a) And once with certification, that the Not-observance should inferr the loss of the Right of Prefertation for the next Vice; Except where the King was Patron. (b) But these Acts are not to be extended to the Stipends of second Ministers within Burghs, or other Stipendiaries, who are not pay'd out of the Teinds. When the Patrons presentation was withstood or oppos'd, he had power to retain the Fruits of the vacant Benefice: But not while he was in mord of presenting. (c)

15. The Patrons presentation to a Benefice affords jus ad rem, and Action for wrongous Intromission, to the party prefer'd: But jusin re comes only by Collation and Institution, which must be perform'd by the Church. (d) Unless where the Presentation is made to a Sine Cure, or Benefice having no Cure of Souls, as Provostries, Prebendaries, &c. In which case no Collation or Institution is necessary. (e) As when a Bishop is Patron himself, and conferrs pleno jure, there is no Presentation, but only Collation: (f) Tho that be an improper kind of Patronage. But then, when Canonical Presentation was said to give jus ad rem, that had not altogether the same Effect in Ecclefiaftick and Laick Patrons; For Pre-

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⁽a) Act 52. Sess: 1. Act 23. Sess: 3. Parl: 1. Ch: 2. Act. 18. Parl: 1. 7. Act 23. Sess: 2. Parl: W & M. (b) d. Act 18. (c) Stair Instit: lib: 2. Tit: 8. 8. 35. (d) M'kenzie Observ: on the 7th Act 1. Parl. Ja. 6. (e) December 11. 1632. I. of Lugdoun contra Edmissoun, Stair Ibid S. 28. (f) July 4. 1627. M'kenzie Minister at Sclait contra his Parisbuners.

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entation by a Churchman was valid and effequal from the date, but a Laicks Presentation was in pendenti, and revokable: (a) The latter, and not the former, being allowed to vary in his choice.

16. The Incumbent could not be removed rom the Benefice, tho the Patrons Right uon whose presentation he was admitted ame to be afterwards reduc'd; If the Patron, was in possession. (b) Now, he is said to be n possession of a Right of Patronage, who hath but once bona fide presented. (c) Nay, a presentation by an appearand Heir, (who was denuded of his Predecessor's Estate, and he Right of Patronage by expired Apprisings) ipon which Collation, Inflitution, and Poflession had followed, was found to give the Minister sufficient Right to the Stipend, and all the Profits of the Benefice. For, albeit the Appryfers had Right to the Patronage, The Minister only, who was actually serving the Cure, could claim the Casualities of the Benefice, by vertue of his Presentation, Collation, and Institution, standing unreduced. (d)

17. Presentations being at length consider d as an Evil, and Grievance in the Church of Scotland, and a Popish Custom, condemn'd by Acts of the General Assembly, as prejudicial

⁽a) F. de Roye ad Tit: X. de jure Patronat: Prolegom: C: 22. (b) C. sonfultationibus 19. Extr: de jure Patronat: Reg: Majest lib. 3. C. 33. N. 5. (c) Mascard. de probation: conclus. 958. Carpzoniurisprud: consist: lib: x. tit: 21. def: 2. N. 9. (d) January 1682. Mr. James Strachan against Jean Forbes, and others the Vassals of his Parsonage.

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to the Liberty of the People in the free plant ing of Churches, and calling of Ministers: It was rescinded and taken away by the 39th. Ad Parl. 1649. In lieu whereof the Patrons got the Heretable Right of the Tithes of their Be. nefices, that remained over and above the Minifter's Stipends; with the burden of future Provisions, and Augmentations, Tacks and Prorogations; and Redeemable by the Heretor at fix years Purchase. Patrons were restored to the power of presentation by the 9th At, 1. Parl. 1. Seß. Ch. 2. But the same is now again discharged, and the calling of Ministers ordain'd to be by the Protestant Heretors and Elders of the Parish: Who are to propose the person called to the whole Congregation, to be Approven, or Disapproven by them, for Reasons to be cognosced by the Presbytrie. If a Call be not thus given within Six Months after the Vacancy, the Presbytry may plant jure de voluto; without prejudice to call Ministers to . Royal Burghs, by the Magistrates, Town Council, and Kirk-Session; with whom if a part of the Parish be in Landwart, the Here his R tors and Liferenters thereof must concurr. his which abolished Right of Presentation, the Patron got 600 Merks, payable by the Town-Council for Burghs; and the Heretors and Liferenters in Country Parishes effeiring to their Valuations, two parts by Heretors, and a third by Liferenters, deducing the Patrons own proportion as an Heretor. Tithes all not heretably disponed, were given to Patron as a farther Recompence for the Right of Pre fentation!

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fentation; but with the burden of Tacks and all their natural burdens, and redeemable by the Heretors at fix Years purchase after Valuation. (a) And this Benefit of the Tithes in ieu of the presentation taken away, was exended to the Patrons of all Parsonages and other Benefices, with the Burden foresaid; And arther, of two Ministers in one Parish, if the Commission think fit: Providing the beneficed Minister in possession continue so, until the Patron provide a Legal Settlement upon him of a just Stipend. (b) But it was found by the Lords of Commission, (c) That a Patron cou'd not claim the Superplus of Tithes, deducing the proportion pay'd to the Minister: Where the wholeStipend was not pay'd out of these Tithes. and also exceeded the value of them. A Paron having in the year 1628 affign'd an Heetor to a Tack of his own Tithes, and to all other Right which he the Patron had, or might ters to have thereto in time coming ; The Patron was Town ound oblig'd to communicate not only Tacks om if a of Tithes and conventional Rights; but also Here his Right to the Tithes obtained by the Super-r. For renient Act of Parliament 1690. (d) Because n, the this is not the Case of a Supervenient Right Town Propping from the Clouds, which could never ors and have been dream'd of; but the formal Conffiring to Lution by Statute of an heretable Title to the

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⁽a) Act 23. Seff: 2. Parl; W. & M. (b) Act 26. Seff. 4. arl: W. & M. (c) In the Case of Sir John Scot of Ancrum, aainst Sir Walter Riddel of that Ilk, and the other Heretors of Junam. (d) 3: December 1698, the Laird of Allardyce against oe Viscount of Arbuthnot.

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Tithes in favours of the Patron, who before had near the Equivalent materially, and in effect by anticipating Tacks: And the Stiled Presentations expressy bore Assignation to the Tithes, which implyed the Cedents pretence Nor is it the case of a conjectural Accrescence from the confideration of the Onerous Caule or when only a particular Title, or any Righ the Disponer actually hath at the time is mad over: But where the accrescing of futur Rights was expresly in view. 2. These futur Rights behov'd mainly to be understood fuch as fell to the Patron by a superveening Law. Because the Acts against the Dilapid tion of Benefices, flood in the Patron's way to hinder him from obtaining without a put lick Law, any other Right than Tacks of Tith belonging to a Church-man. And feeing the parties had unknown Events under their con fideration, there is no doubt, but, had the Pa tron acquired Right to the Tithes by Successi on to some remote Relation, or by the volu tary Deed of some pretender; such an Acqui tion would have come under the Affignation which yet is as casual, and could be as litt foreseen, as the Act of Parliament 1690.

18. 'Tis a known Brocard among the Glufers on the Canon Law. That Patronum fair unt Dos, Adificatio, Fundus. And according to the general Opinion of Interpreters, or and the same Church may have several Perons. As if one should build it, or but corner of it; another bestow the Ground a third settle a Revenue for the Minister.

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Maintenance: All which things, fay they, entitle one to a Right of Patronage. Yet some deny, that Patronage is acquired by the giving of the Ground only. (a) But then all own, that even the Rebuilder of a demolished Church has a Title to the Patronage on't. And as to the first builder, that his Right falls, if acquir'd only by the building : But that if he also had endowed the Church. he becomes a conjunct Patron with the Rebuilder. (b) While the Parish Minister, in ancient times, subsisted upon the free Oblations of the people; those were then so large, and confiderable, that fome persons built Churches on their own Lands, to have a Share of them. Whence one of the Spanish councils (c) held about the Year 570 forbids, with great Severity the confecration of Churches, built sub Tributaria Conditione, and not pro San-Storum Patrocinio. When we say, that a Right of Patronage is acquir'd by Dotation, that is to be understood of a competent Endowment: For he who bestows something that is not a lufficient maintenance for the beneficiary, doth not become Patron; but is only stiled a benefactor. (d) But then severals concurring and contributing at the same time, tho unequally, by whose joint contribution a competent Endowment is made up, are understood to be conjunct Patrons. (e)

⁽a) Fr. de Roye ad Tit X. de Jure Patronat Prolegom. Cap.

13. (b) Ibid. Cap. 14. Zoef. ad Tit. X. de Jure Patronat. N.

6. (c) Concil. Brocar. 3. C. 6. (d) Garcia de Beneficiis,

Tom. 1. P. 5. C. 9. N. 52. (e) Ibid.

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19. The Emperor Zeno permitted the Found ders or Endowers of Benefices, to infert any Laws or Statutes in the Foundation Charters they pleas'd, (a) for Administration of the Rents; according to the Rule of Law, Quili. bet rei suæ Legem dicere potest quam velit. (b) and these Fundamental Laws did sometimes respect the person, on whom the Benefice might be confer'd, viz. That he should be of fuch or fuch a Nation, Family, Condition or Quality. (c) Which must be observed even in the case of a Lapse, by the Superior. to whom, Jure Devoluto, the power of prefenting accresceth, (d)

20. The Right of Patronage hath been Sometimes simply renounc'd by the Founder or Endower of a Church; and sometimes only referv'd as a Temporary Right for a limited Degree of Kindred; which failing it ceas'd. From thence some conclude, that Patronage is competent ipfo facto, tho not exprefly referv'd, if not renounc'd in the Foundation Charter. (e) But others (f) think an express Reservation is necessary : Because Fus Patronatus est Servitus Libertati Ecclesia impofica; and Servicudes are never prefum'd in Law. Those who contend, that Patronage

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⁽a) 1. 15. Cod. de SS. Ecclesiis. (b) 1. 20. S. 1. ff. de Pa-Etis Dotal. (c) De Roye ad Tit. X. de Jure Patron. Cap. 25. (d) Zief. ad Tit. X. de Prebend & Dignitat. N. 22. (e) Garcia, Ibid. N. 62: & seqq. de Roye ad Tit. de Jur. Patron. Prolegom Cap. 15. (1) Bengaus de Benefic. ad Verb. cum suo Redit. Cap 4. P. 1. S. 6: N 4. Hope in the Leffer Practickt, Mackenzie Observ, on the Ast 7. Parl, 1. J. 6:

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s acquir'd ipfo facto by the building or doting f a Church, tho not reserved in the Foundaion Evident, will by no means allow the ame to be a Servitude. Because they alledge was a priviledge freely introduc'd by the thurch out of a principle of Gratitude, by vay of Remuneration for pious Liberality. . Nulla Servitus imponi potest Loco Sacro, Saneto. religioso. (a) Ol but say these of the other Opinion, at that rate, all Churches wou'd be under patronage, having been built and endow'd by some body: And yet we ind, that many are free. The Answer given s. that some Patrons lost their Right non uteno, and by prescription; others renounc'd it at the Foundation. However we find Churches before the Reformation to have been fo generally under patronage, that none were prelum'd free; and the Popes Right as universal Patron was sustain'd, when no body else could instruct a Title to the patronage: As after the Extirpation of Popery, the King Jure Coronæ was accounted Patron, if another did not appear. For at the Reformation, as Hope (b) observes, all patronages belonging to the Pope, were, by the Act of Parliament abolishing his Authority in Scotland, established in the Kings person: And these pertaining to Bishops, Abbots, and Priors, his Maesty acquir'd Right thereto by mere custom. 21. All Rights of patronage were original-

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⁽a) L. 14 in fin: ff. de Servitut: de Roye Ibid: cop: 5. (b) Practicks tit: Kirks and Benefices.

ly of the same kind and nature. But came length to be diffinguished into Ecclesiastic and Laick. The former are those belonging to Church-men as fuch, that is, upon the ac count of the Ecclesiastick Benefices they pol For any Right of patronage a church man enjoys tanquam quilibet, or Jure Heredita rio, is called Laick patronage. Under the Denomination of Ecclefiaftick patronage, comprehend fuch as hath flowed from the King fince the Reformation, as come in place of the Pope. Prelates were not properly Pa trons, with respect to their Mensal, or common Churches. For in the former, (which they planted as Diocesans, and served by Vicars) they, as Titulars, got the Fruits of the Benefice, and the Incumbent but a Sti pend; now a Right of patronage doth no carry the Rents, but a simple 7m Prasentandi And in the latter, the Bishop did not present but confer, pleno jure, by collation and institution, a full Right to the Benefice; wherea Ecclefiaffical patronage is properly a Right of presentation to a Church within anothers Di ocy, where the ordinary of the place mul give collation. And therefore, when a Bi thop acquired the patronage of any Church within his own Diocy, it became free, and was confer'd by him pleno jure; fince he could not present to himself. But then, the person collated in that case was no Stipendiary, (his predecessors were not such before the Bi

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⁽a) De Roye ad tit; de jure Patronat:.

shops Right,) but had Right, as Parlon or Vicar, to the full benefit of the Fruits, except in fo far as restricted by lawful Tacks. Lords of Erection, after the Reformation, got frequently the Gift of patronages ingroffed in their charters of Church Lands, and tho the fame did not bear Rights of patronage exprefly; vet they "exerc'd them, and acted as Pations. Which was quarrelled by the King, but the point of Right hath never been determined

by a legal Decision.

22. Laick patronages are fuch as the King disponed before the Reformation, or Laicks have founded fince. And even these require to be constitute upon a Signature from the Sovereign. (a) Lay-patronages were first set up by Justinian, upon which a base Merchandize hath followed; and nothing hath more defil'd the House of God. (b) Some Laick patronages pertained to the King Fure Private, qua Founder or Endower of the Benefice, or as being purchased from private persons; or as the pertinents of Lands or Baronies fallen in his Majesties hands by Recognition, or Forfeiture, as the patronage of the provostry of Lincluden by the Forfeiture of the Earl of Douglass, the patronage of the Colledge Church of Dumbar by the Forfeiture of the Earl of March, the patronage of the provoscry of Kirkbugh by the Earl of Fife's Forfei: ture. Sir Thomas Hope (c) is of Opinion.

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⁽a) Mackenzie Observ. Ibid. (b) B Burnets Hist. of the Rights of Princes, Chap. 4. (c) Pract. Tit, of Kirks and Be-Defices.

that all Laick patronages in Scotland did once o Bi pertain to the King, and were transfer'd by he S him to the Subjects. In fortification whereof he alledges, I. That when King Malcom Kenmure disponed all his Lands to his Subjects, referving only the cafualities of Ward and Marriage, he disponed also to them, at the same time, all patronages within the compass of the Lands convey'd. And the rather, because all Bishopricks, Priories, and Abbacies then in Scotland had been founded by King Malcom and his predecessors: Whereby they had power to referve the patronage to themselves, and to erect small Benefices. 2. That all the Lands, Churches, and Tithes in Scot. land belong'd to the King during Paganism And whatever the Pope attain'd to, or became Master of after Christianity got Footing, did flow from the King, qualified with fuch con ditions and Refervations as his Majesty thought The patronage of all Bishopricks belong'd to the King. The Chapter us'd indeed the Formality of Election: But cou'd not pitch upon any, fave him the King recommended, he always being an actual Minister of the Church. The Election gave Right to the Spirituality of the Benefice; But the Temporality was not conferr'd without a charter from the King, after confecration: For which the Bishop consecrate behov'd to do Homage, and Iwear the Oath of Allegiance before Intromission. (a) All patronages formerly belonging

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⁽a) Att 1. Parl. 22.7.6.

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once o Bilhops, are now in the Queens person, by he Suppression of that Order: And tho they hereof vere not Patrons of their own Menfal Chur-Malcom hes, yet her Majesty is. She is also Patron bjects, fall common Churches, since the Dissolution; and and accept such as were disponed by her Royal at the predecessors to private persons. As for Colompass edge Churches, Chaplainries, and Altarages, her, be hese are under the patronage of their particu-obacies ar Founders, and their Successors: But the W King Queen is Patron of most of the Colledge Chur-by they ches. Patrons of Provostries, Prebendries, them Chaplainries, and Altarages holding of the . That King by Infeftment, are allowed to prefent n Scot the same to Bursars in Colledges at their plea-ganism sure: (a) And declared Superiors quoad the became Entry of Vassals of the said Benefices. (6) g, did But this is not to be extended, in the Opinion h con of the Lord Dirletoun, (c) to fuch as are Pahought trons by simple provision in the Foundation, elong'd por yet to Ecclesiastick Patrons. (d) Yet Sir ed the fames Stuart her Majesties Advocat, in his excellent Notes upon Dirletouns Doubts, will ended, have the Act comprehend Ecclesiastick, as well as Laick patronage: The principal reason of the Act being, that Chaplains are out of use. Tho, at the same time, he wisely suggests the conveniency of making an Act of Parliament o clear all these Niceties, whereby property may be any wife incumber'd. The 29. Act.

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⁽a) Act 12. Parl. 1. Act 158. Parl. 12. 7. 6. (b) Act 4: Parl: 1: Seff: 1: Ch: 2: (c) Doubts and Questions in the aw, Title Altarage (d) Ibid. Title Chaplainty.

(62)

Parl. 11. 7. 6. doth except from the Annexal tion, Lands belonging to Benefices of Laick patronage; that is, such Laick patronages as were duly established before the Reformation. (a) But yet Rights of Laick patronage granted before the Year 1561, were declared to fall within the compass of the general Submission, and the Kings Decreet Arbitral, in fo far as concern'd a compleat Maintenance to the Minister, the Tiends of other Mens Lands, and his Majesties Annuity; and only the remanent Tithes thereof to pertain to the Laick Patrons in price, or rate, in all cases where they were in possession seven Years of fifteen immediatly preceeding the general Submission. (b) It was fully debated, but not decided, November 1677, (c) whether all the other patronages formerly belonging to Monastries, fell under the Annexation 1587? It was urg'd for their being annexd; That, by the first Words of the 29. Act, 11. Parl. 7.6. the Abbacies, and all profits or Emoluments whatfoever belonging to them were annex'd, and confequently patronages: Especially considering, how much it was the Interest of King and Parliament, to have these depend upon the Crown, for preventing the malign Influence of private Schismatick Patrons. 2. In the Reduction drawn by Sir Thomas Hope, all Rights made to the Lords of Erection of patronages formerly pertaining to Monastries, were crav'd

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⁽a) Mackenzie Observ. upon the Act 7. Parl. 1. J. 6. (b) Act 19. Parl: 1: Charles 1. (c) In the case of Stuart against the Laird of Watertoun.

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be reduc'd as contrary to the Act of Ani exation. Upon which Reduction the Erectin-Lords submitted their Rights to these paronages, and the King, in his Decreet Arbiral, determin'd them to have only Right to the converted prices of the Feu-Mails of their Superiorities, &c. 2. It was also contended. hat the patronages were annex'd by the 12. and 14. Acts of the first Parliament, Ch. 1. To all which it was answer'd, That patronaes were never annex'd as parts and pendicles. But always per expressum, as in the Annexation of the Abbey of Dumferling. (a) And it is abfurd to think, that when the general dause in the Act 1587 did specify the meanoff things, as the Service of Tennents, it wou'd have omitted patronages that are of fo great confequence, had it been the defign of the Parliament to have these annex'd. those having Right to Ecclesiastical patronages had ever dream'd of their being annex'd. they had certainly crav'd a Dissolution in Parliament, which no person ever did. Nor were patronages annex'd by the 12: and 14. Acts of the Parliament 1622, seing these do not mention them expresly, and they cannot luence come under the General of Pertinents, for the n the Reasons foresaid. Farther, to shew that King Charles the First had determined nothing as to Rights patronages belonging to Lords of Erection, onages crav'd the 12. Act of his foresaid Parliament doth Dear these Words, Likeas also the remanent points .6. (b)

⁽a) Att 189: Parl: 13: 7: 6.

of our faid Commission anent the Patronage of Kirl &c. ate not yet begun to be treated. Anno 158 the first Fruits of all Benefices, except Laid patronages, were allotted as a partial Fund for establishing a Horse Guard to the King.

22. The Canonists tell us of many thing wherein Ecclefiastick and Laick patronage r. They allow four Months to a Laid Patron to prefent in; (b) and fix Months an Ecclefiastick. (c) Which Distinction was once Law with us: (d) But by the Att Parl. 1, 7. 6. Laick Patrons were also allowed 2. If the Lay Patron present a fix Months. unworthy person, he may pitch upon another But an Ecclefiaffick, by lo doing, Forfeits hi Right for that bout, and is not suffered to a cumulate presentation upon presentation ignorance being not fo excusable in him as Laick. (e) And that was the Reason for allowing a longer time to Ecclefiasticks, that to Laicks to present in, (f) But then some think the Lay Patron should not vary mon than once; (g) others are of Opinion, that he may vary as oft as he will. (b) Our Law

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⁽a) Act 137: Parl: 8: 7: 6: (b) C: cum propter 27 Extr: de Jure Patronat: C: un: S: 1: Extr: eod: in 6: Duare de S: Ecclef: Minist: & Benef: Lib. 5: C: 4: Carpzov: Jus Confi Lib: 1; Tit: 2: Def: 15: Les OEures d'Epeisses de Benefices Eccle Tom: 4 Tit: 3: N 7: (c) Nov: 123: C: 1: 5: 2: d: C: un: 1: C; eamve 22: Extr: de jure Patronat: Duaren: Ibid: Carpan Ibid: d'Epeisses: loid: (d) Regiam Majest: Lib: 1: Cap: 1 (e) Bengaus de Beneficiis ad Verb: cum suo Rediru; C: 4: Part 1: 5: 7: N: 10: d Epeiffes: Ibid: N: 14: 6 15: Garcia de Benef Tom: 1: P: 5: C: 9: N: 21'1: (f , Zoef: ad Tit: X. de ju Patronat: N: 45: (g) Arg: l: 89: S: 1: ff: de Reg Juit Garcia. Ibid; N: 214: (h) Zoef; Ibid; N: 48.

(65)
llowed any Patron to alter his prefentation. nd one being found unfit to name another; and hat as oft as the persons presented were reeded: So be, all the presentations were withn fix Months. For one presentation within hat time doth not fo interrupt, as that he, he Patron, may present again within other x Months. Unless those having Right to the fus Devolutionis, did hinder the presented persons Admission; who cannot pretend to ny benefit by their own fault. (a) But then, hoa Lay Patron may again present after his first Nominee is rejected as insufficient; he cannot f himself recede from the first Nomination. b) 2. In the case of two presented by an ecclesiastick Patron, the first presentation was referable. But two persons being presented y a Laick Patron, the Bishop had his Option o give collation to either of them. The Pope might prejudge an Ecclesiastick, out not a Laick patronage: (d) That is, at ny time before the presentation pulsaverat ures ordinarii. (e) Patronage in casu dubio, s presumed to be Laick, and not Ecclesiastick: Because, say the Doctors, we are not born Clergy-men, but Laicks, and are still presum'd o be such, while the Ecclesiastical character is Jus Confi ot instructed. (f) Lay patronages frequentfices Eccie d: C: un: \ y turn Ecclesiastical in process of time, either id: Carpan 1: Cap: 1

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⁽a) M'kenzie Ibid: (b) De Roye ad Tit: X. de jure atronat: Cap: 24. Zoef: Ibid. (c) C: cum autem 24: atr: de jure Patronat. Bengaus, Ibid: N. 9: (d) Ibid: 1: 11: & 12: de Roye: Ibid: Frolegom: Cap: 7: (e) Ibid: ap: 22: (f) Ibid: Cap: 6:

by the Lay Patrons making over to Churches his Lands and Estate with annex'd patronages.

24. By the Canon Law, altho the Right of patronage transit cum Universitate, unless it be specially excepted: (a) It cannot be separate ly fold, (b) as being Spiritualitati Annexum, and not in Gommercio. Nay, some are so nice and squeamish in the matter, that they'll not allow Lands to be fold any thing dearer, up on the account of annext patronage. (c) But with us patronages are bought and fold in the same manner as any other Right. Some times they are transmitted as annex'd to Lands in charters of Burghs, Baronies, or Lordships and sometimes by distinct Rights, and then they pass without Infestment as Jura Incorporalia. (d) Yea, not only is a Right of patronage transmissible by Disposition without Infefrment; but also it was found, that a perfon, in whose favours one was ordained by a Decreet Arbitral to dispone such a Right, might effectually authorize by his confent as Patron the Deed of an Incumbent; so as his Successor in Office cou'd not justly quarrel the same. (e) This Decision seem'd hard to my Lord Dirletoun, because none can effectually consent as Patron, who cannot present; and

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⁽a) C: ex Literis 7. Extr: de jure Patronat: (b) C: quis Clerici 6: C: de jure 16: Extr: eod: (c) Zoes: ad Iit: X. de jure Patronat. N: 20: Barbos: Collect: Doct: in C: ex Literis de jure Patron: N: 2: (d) Stair Institut: Lib: 2: Tit: 8. 9: 35 (e) July 6. 1666: Parson of Morum against the Lairds of Beirsoord and Beinstoun.

(67)

he patronage might have been compriz'd rom, or dispon'd by him who was ordained 'Tis true he was not so denuded o denude. by the Decreet, but that notwithstanding hereof, before obedience given, the patrohage might have been comprized from him, or disponed to another; and that other, as having he more formal and compleat Right, would have been prefer'd. But there being no fuch competition, it was not thought competent to a Minister to reduce a Right granted by his predecessor, upon that ground. In the Opinion of one of our greatest Lawyers, (a) a Right of patronage by the Foundation, being provided to one, and not to him and his Affigneys, with a Quality, that he failing to present within a certain time, another might exerce the priviledge: The Patron institute may dispone the patronage, or it may be adjudg'd from him, notwithstanding the Substitution. Yet still so, as if the fingular Succesfor do not timeously present in the Terms of the Foundation, the Substitute may. Where patronage is incorporate in the same Charter with Lands, Seasin of the Land is sufficient, without necessity to take special Seasin of the patronage: As petty Customs in the like case may be constitute by a Charter, without Seafin. (b) A Right of patronage being annext. to Lands, is tacitly carried by a Disposition of these Lands; (c) unless it be therein special-

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⁽a) S: J: Stuart Queens Advocat: (b) July 5: 1632: Sheriff of Forrest contra Town of Selkirk: (c) D'Epeisses Tem: 4: Tit; 3: N: 17; Craig: Feud: Lib: 2: Dieg: 8.

ly excepted: But unannex'd patronage is not fo convey'd. (a) Yet Barony and Benefice being nomina Universitatis, do carry patronage as well as Milns, or Salmond-Fishing; and that by Resignation, Apprysing, Adjudication

on, Recognition, or Forfeiture.

25. The Canonists hold, that a Patron may be excluded from the Jus Præsentandi, either for a time, or simpliciter. The Grounds for a Temporary Exclusion of a Right of patronage, or rather a Suspension of the Effect on't are, I. An Ecclefiaffical Patron, by prefenting an insufficient person, loses his Right for that (b) 2. Excommunication of any Patron, or his falling into Herefy, makes his Right to cease, or sleep while he continues in that State. (c) And tho our Law hath taken away the civil Sting or Pains of Excommunication: (d) It doth not allow Popish Patrons to dispose of vacant Stipends for pious Uses, but by Advice and Appointment of the Presbytry. (e) 2. If a Patron don't apply vacant Stipends to pious Uses within the Parith, except they be vacant Stipends within the Synod of Argyle, he forfeits to the Presbytery, his Right of Administration for that, and the next Vacancy. (f) Patronage is simpliciter or totally excluded by prescription of 40 Years. (g)

26. The Exception of Decennalis & Trien nalis Possessio, was not relevant against the Pa-

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⁽a) Ibid: (b) De Roye: Ibid: Cap: 38: (c) Ibid: (d) W: and M: Parl: Seff: 2. Cap: 28: (e) Ibid: Cap: 23: (f) Ibid: (g) De Roye; Ibid: Cap: 16.

(69)

ron, in respect of the Clause in the Rule of Chancellary, Dummodo per eos ad quos Præsenatio pertinuit, presentati fuerint. And by the Att 61. Parl. 11. J. 6. no Laick infest in Lands with the Right of Patronage annex'd, could e prejudg'd by any long Possession of an Eclesiastical Intruder, while the Lands were Wadset: But he Redeeming quandocunque, reurn'd to his Right of Presentation. Because, during the not Redemption, the Granter of he Wadset was not valens agere; and the Wadfetter did not look upon himfelf as Hereor. But Church-men now prescribe a Title by 40 Years uninterrupted Possession, excluive of all Rights of Laick Patronage annex'd o Wadlet Lands, as well as others. (a)

27. According to the Canon Law, the Right of Patronage goes to Heirs; but as a fus Individuum, it does not divide among em: For if there be several Heirs, they are all Patrons in solidum, (b) and present conjunctly.

(c) But with us, if Heirs Portioners succeed, Rights Individual fall to the eldest. (d) And even in other places, to prevent Differences among Children, the Right of Patronage useth not unfrequently to be conceived in favours of the eldest. (e) And where that is omitted, the Children use, upon the Patrons Decease, either to decide the Patronage by Vote

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c) Ibid:

Cap: 23:

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⁽²⁾ Mackenzie Observ: on the Act 61: Parl: 11: 3: 6: b) C: perlatum 1. Extr: de jure Patronat: (c) Clem. 2: od: Tit: Duaren: de S: Eccles: Minist: & Benefic. Lib: 5: Cap. 4: Zoos: ad Tit: X: de Jure Patron: N: 10: (d) Stair Institation 3: Tit: 5: 5: 11: (e) De Roye: Ibid: Cap. 9.

(70)

among themselves; or agree to present by turns. (a) As in the Civil Law, Servitude may be constitute so, as severals may use them alternis vicibus. (b)

Benefices; their Temporality and Spiritualing fall next to be confidered: But in order to right understanding of these, and for our clear er proceeding in this Matter, it will be requisite to take a previous view of the Origine and progress of Ecclesiastical Revenues in the several Ages of the Christian Church.

(a) Ibid Gap. 19. (b) L. 34. pr. ff. de usu frue 1.5. S. 1. ff. de servitut.

CHAP. V.

The History of Ecclesiastical Revenues, from
the Commencement of Christianisy, the
Commissions of Parliament were appointed
for Planting of Churches, and Modifyin
Ministers Stipends.

hE Christian Church posses'd a fix'd Revenues, until about the fourth Century; except some Lands, or rather Fields and Galdens in Rome, and the greater Cities, which upon Dioclesian's Persecution were seized.

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iz'd, and Confiscated. For such as she had efore, were very uncertain and precarious; ay, rather a kind of occasional subsidies gahered from the exuberant Charity of Belieers: out of which Ecclefiastical Persons drew nly fo much as fuffic'd for a necessary Alinent; what was over being carefully imployd for Relief of the Poor, and fuch like Pious Ifes. The Distribution and Management of his Stock-purse of the Church, was first comnitted to the Apostles; (a) and then to Bishops. (b)

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2. The Emperor Constantine the Great, turhing Christian, chang'd the Scene, and the Church put on a new Face; I cannot fay a better, because of the infuing Corruptions. He bestow'd many Gifts and Favours upon the Christians, and built them Churches, which he provided with Rents for an Honourable Maintenance of the Ministers. scinded all Laws and Edicts to the prejudice of Christians: particularly such as hindred People to bestow Lands and Inheritances upon Churches; and ordained that they should succeed to the Estates of Martyrs, or Confesfors that died without Heirs. Constantines zeal did carry him to do every thing for the Honour of the Christian Religion that he could think on. Nay, farther, as Mr. Milton (c) expresseth it, he was so Liberal a Nursing Father to the Church, that he either overlaid,

⁽a) Acts 4. 34, 35. (b) Socrat. Hift, Eccles. lib. 7. cap. 25. (c) Vol. 2, of his Works p. 760.

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or choak't it with his fondness in the Nursing This Serene and prosperous Season the Church injoyed, suggested Fears to many prudent Christian Fathers, that it might produce a de cay of Piety and Vertue, which put them upon Disputing the Lawfulness of accepting Lands and Possessions. Some alledged that the Exemples of our Saviour and his Apostles bound them to contemn the World, and to live in poverty, expecting no Reward for their Labours on this side of Heaven. (a) O. thers conceiv'd that Course to be but temporary, affirming the time was come to Crown the long suffering of the Church, with the Bleffings promised in the tenth of Mark. (6) The first Opinion furnished a Pretext to Julian the Apostate, for his Revoking the Churches Priviledges, and taking away their Indow ments. But his Edicts were Reverled by 70. vian & Valentinian.

3. When the Church came to get Lands and Rents, and to be incumber'd with Civil Affairs, an Imperial Law (c) was made anno 407, Exempting the Clergy from looking after their Causes, and allowing the Bishops to constitute Advocats or Defensors for their Churches and Poor; who might negotiate their Law Pleas and other Affairs. These Advocats were called afterwards in Scotland,

⁶ L. Thomassin la discipline de l'Eglise touchant les bonesices part 1. liv. 4. chap. 1. & 2. (b) vers. 29. & 30. (c) God, Theodos. De Episcop, et Cleric, tit. 2, 1. 38.

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4. The Bishops liv'd then in a Collegiate manner with their Clergy; and had community of Goods: and the Clergy were called Canons, quia secundum certes Canones vivebant. But about the year 472, we read of a Famous Division of the Rents of the Church into four parts: of which one was to go to the Bishop. nother to the rest of the Clergy, a third to he Poor, and a fourth for the Fabrick. Which the Learned Bishop of Sarum (a) observes to have taken place as a Rule univerally for many Ages, all over the Western Churches; except in Spain, where the Goods of the Church were Subjected to a Tripartite Division, and the Poor excluded from any Proportion: The I find no Vestige of this our-fold Partition in Scotland. The Canons, who got thus their Provision distinguished from the Bishops Portion, continued some ittle time after in a social State, and professed one Rule of Life, eating and fleeping in the fame' Dorter and Refectory: but wearying of this, they chus'd to have their own Apartments, and to be Masters of their own Diet. In order to which the common Revenue was subdivided and parcelled out among them. And they from that occasion got a new genes al Name of Prebendaries, beside the particular Titles of Dean, Arch-deacon, Chanter, Subchanter, &c. bestowed on them upon the

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account of peculiar Offices: and the diffind Localities affign'd for their Subfiftence, were in the general called Prebends, and in particular Deanries, Arch-deaconries, Chanteries, &c. But then the Canons turn'd less vigilant in their Ministry, and Remiss in Discipline, neglected to Affist in the Chair, and took up their Residence where they pleas'd, tho never fo remote from the Cathedral or Collegiate Body: and thereby most justly procur'd themfelves to be stiled fecular Canons. When much of the Revenue of the Bishoprick came to confift of Parish Churches annex'd, these that fell to the Bishops share, were called Mensal Churches, because his Table was maintain'd out of the Rents of 'em: and fuch were termed common Churches, as were allotted for the common uses, and benefit of the Chapter, and in planting whereof the Bishop with his Chapter had an united Interest.

own'd any other Name save that of Bishop, as the distinguishing Character of him who had the principal Administration; And when any Bishop had Jurisdiction over others, she called him the first Bishop. The Greeks invented a great many new Words to express the different Offices of the Ecclesiastical State: Such as the honourable Titles of Arch-bishop, Primate, and Patriarch. But in process of time, the Romish Church did not only adopt these; but also the topping Characters of Pope and Cardinal were introduc'd: Whereof the

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6. When the Ruling Order of Bishops was first let up in Scotland, is not agreed on all hands. This is certain they were but a flying party, or a Ministerium vagum, called Episcopi Scotorum, till Malcolm Kenmure's time, who affign'd them particular Districts, and Dioceses. But in process of time an Ecclesiastical Hierarchy was established among us, consisting of two Arch-bishops of St. Andrews, and Glasgow; Whereof the former stiled Metropolitan and Primate of all Scotland, had under him eight Suffragan or Subordinate Bishops of Dunkel. Aberdeen, Murray, Brechin, Dumblane, Ross, Caithness, and Orkney, and for his Chancellor or Viccar, the Bishop of Edinburgh: The latter had within his Province only three Suffragans, of Galloway, Argyle, and the Isles. St. Andrews was made a Bishoprick by Kenneth the Second: and the Prelate thereof invested with the Character of Arch-bishop and Primate of Scotland by Pope Sixtus the Fourth. King Alexander the First gave great Things to the Church of St. Andrews, particularly the Cursus Apri, or Bears Reak; and erected their Lands in a Regality. Arch-bishop John Hamilton was hang'd at Stirling for Treason, (a) and was the only Bishop in this Kingdom that suffered by way of Justice. The Rents of this Bishoprick for some years were conferr'd upon the Earl of Mortoun, (b) in Recompence of the vast Charges of his Em-

⁽a) 1570. (b) 1571.

bassy to England. who to Legitimate his Title to these Rents, procur'd John Dowglass Principal of the new Colledge of St. Andrews, to be admitted and installed Titular. King James the Sixth bestowed the Profits of the See of St. Andrews, after the death of Bishop Adamson, upon the Duke of Lennox; who continued to injoy the same, till the Temporalities of Bi-Thopricks were restored by the Parliament 1606; and retained the Rents of the Priory till Bithop Spot/wood procur'd them to be annexed to the Bishoprick. The Provostry of Kirkbugh was united to it with some Exceptions, by the Parliament 1621: The Diocese of St. Andrews takes in all Fife-shire, with some parts of the Shires of Perth, Angus, and Merns. King Charles the First founded and indowed the Bishoprick of Edinburgh in the year 1622: And Dr. William Forbes was the first Bishop thereof. David Lindsay his Successor had like to have been sacrific'd to the Fury of a Rabble upon the first reading of the Book of Common prayer in Edinb. July 1637. The B. of Edinburgh was made (what the Bishop of Dunkeld had been formerly) Suffragan or Vicar to St. Andrews, and Conveener of the Electors, and so the first ordinary Bishop. His Diocese comprehends the Shires of Edinburgh, Linlithgow, and Berwick, the Constabulary of Haddingtoun and Bailliarie of Lawderdale. King David founded the See of Dunkeld: And bestowed the Lands of Auchtertuil, with diverse others, upon it. Bishop Carden acquir'd thereto the Town of Cramond, with the Lands adjacent; For which he Excambed the Lands of Muchlet

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77) Muchler and Cambo. Mr. Thomas Lawder got the Bishops Lands on the North-side of Forth erected into the Barony of Dunkeld; And thefe on the South into the Barony of Aberlady. Alexander Lindlay Brother to the Laird of Evelick was frighten'd by the threatned Centures of the Assembly of Glasgow into an abjuration of Episcopacy, submitted to Presbyterian Government (a) after he had been Bishop, and accepted the charge of a particular Parish. The Diocese of Dunkeld contains some parts of Angus and West-lothian, and the West part of Perth-shire. King Malcolm the Second in Commemoration of a Signal Victory over the Danes at Murthlack in Angus, founded there a Bishoprick: Which he indowed with Rents of the Lands thereabout, viz. Murtblack, Clovetb, and Dunmeth. King David (b) translated the See to Aberdeen: And inrich'd it with the Lands of Old Aberdeen, Sclaty, Goull, Moorcroft, Kurmundy, Mowenlach, Clat, Talynstine, Rayne, Dawyot, and their Churches; With diverse others Lands. The Diocese of Aberdeen extends it felf through the whole Shire of Aberdeen, and most part of Bamff and Merns. Lefy and Spot (wood tell, That Malcolm the Third erected the Bishoprick of Murray: But Sir J. Dalrymple doth not allow it to be so antient. Who was the first Bishop of Murray, we find not; But Binius founded the Colledge of Canons, and Alexander built the Palace of Kineddore. When most of our Scots Bishops withdrew

(a) Anno 1639. (b) Anno 1142.

into England, to avoid the Storm which threat. ned them: John Guthrie adher'd to his Bishop. rick of Murray, till he was put from it, and then retir'd to his antient Inheritance of Gutbry, in Angus; where he died during the Civil Wars. The Diocese of Murray contains the Shires of Elgin and Nairn, besides part of Inverness and Bamff-shires. The Bishopricks of Brechin, Dum. blane, and Rols, were all founded by King The Church of Kincaid was dissolved from Brechin in the year 1597; and erected in a several Parsonage, and the Patronage disponed to Sir David Carnagy. The Diocese of Breckin contains part of Angus and Merns, Gilbert Earl of Stratbern gave a third of his Lands to the See of Dumblane. Bishop Ochila tree acquired to it a great part of the foresaid Lands of Strathern. The Chartulary or Writes of the Bishoprick of Dumblane are not to be found. Sir James Dalrymple conjectures they have been carried over Sea at the Reformation by George Thomson, or some other Church-man of that Diocese. The Temporality and Spirituality of the Abbey of Corfregal, and Priory of Monimusk was annex'd to this See in King Fames the Sixth's twenty second Parliament. (a) The Bishop was Dean of the Chappel Royal, annex'd to the See of Dumblane by the Parlia. ment 1621. Robert Leightoun was the greatelt Ornament of this Bishoprick: In whom most of the eminent Vertues of the Primitive Bishops feem'd to be reviv'd. The Diocese of Dumblant

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⁽a) 1617.

(79) confifts of part of Perth and Stirling Shires. John Lefly who wrote the History of our Nation, and had been once a Senator of the Colledge of Justice, was the last Popish Bishop of Ross. He was Embassador from Queen Mary to the Queen of England; and afterwards retired Abroad, whether probably he has carried the Writes of the Diocie. The Cathedral of Channery, where the Bishops Seat is, was demolished at the Reformation; But some part of it is fince Rebuilt. The Jurisdiction of the Diocese comprehends the Shires of Tann, Eromarty, and the most part of Inverness-shire. Fern was annex'd to the Bishoprick of Ross in the year 1617. According to Lelly and Spot wood, the Episcopal See of Gaithness was founded by Ochila King Malcolm the Third; But Sir James Dalefaid symple makes that Foundation to be of a later Vrites date. The Story of the Caithness Bishops is reto be they markable, for that fad and unexempled Tragedy acted upon Bishop Adam. (a) Dornoch in ation Sutherland is the Bishop of Caithness's Seat; and -man his Diocie comprehends the Shires of Caithness Spiriand Sutherland. 'Tis because Orkney was long riory King Subject to the Norvegians, that we have no antient Accounts of that Bishoprick. We find ment. Loyal, only four or five Bishops there, before the Reformation. Adam Bothwel Bishop of Orkneyonce arlia. eatel depos'd for marrying Queen Mary to the Earl most of Bothwel, was the only Popish Bishop that ichops imbrac'd the Reformation, and continued in mblans Office in Church and State. George Grahame Bishop of Orkney was mov'd with the Censures

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of the Assembly of Glasgow to renounce Epis copacy, and take up with Presbyterian Go. vernment. Bishop Andrew Honyman being in Coach at Edinbulgh with Arch bishop Sharp in the year 1668, receiv'd a wound in his Arm by a Pistol Shot aim'd at the Arch-bishop by a person who suffer'd Death for it. Buchanan in his Description of Orkney, speaks of a strange Test that the Inhabitants put to their new Bishops at their first coming to them: Which is to drink up at one draught an antient large Cup or Goblet full; which they fay belong'd to St. Magnus, who first taught them the Principles of the Christian Religion. He who performs it is counted a very Non-such of a Man; and they promise themselves very plentiful Croptsall his time. K. James the 4th.erected the Lands of the Bishoprick of Orkney into a Regality, in the year 1490. The Diocese consists of all the Northern Isles of Orkney and Shetland. Sir James Dalrymple informs that there was no Bishop of Glasgow till the Reign of King Alexander. King David bestowed the Lands of Patrick upon that See. Robert Blackader was the first Arch-bishop thereof. As for the Story of St. Mungo, it favours too rank of the Legend. Fames Bethun the last Popish Bishop being attainted of Treason, fled to France in the year 1560, with all the Ornaments, Plate, and Papers of that Church, which he lodg'd in the hands of the Carthusians in Paris: To be restord when Scotland return'd to the Church of Rome. Robert Montgomery exchang'd his Bishoprick with with the charge of a particular Parish in Kik.

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(a) The Shires of Dumbartoun, Renfrew, Air. Lanerk, with part of the Shires of Roxburgh. Dumfreis, Peebles, and Selkirk, made up the Diocese of Glasgow. St. Ninian is commonly called the first Bishop of Galloway or Candida Case: But some think more probably that he was only a private Culdee, or at most one of the Episcopi Scotorum mentioned Chap. 2. N. 2. According to Sir James Dalrymple's Chronology. (b) Christianus is the first Bishop. The Bishop of Galloway was Vicar to the Arch bishop of Glasgow, (c) and Conveener of the Electors. The Shire of Wigtoun, Stewartry of Kirkeubright, Regality of Glenluce, and some of Dumfries sbire, are the constituent parts of the Diocese of Galloway. The Bishoprick of Argyle was taken off the See of Dunkeld, about the year 1200 by Pope Clement the Third, at the motion of John Scot Bishop of Dunkeld: And erected in favours of one who could Speak and Preach in the Irish Tongue to the People of the Province, who understood no other Language. The Seat was appointed at Lismore: And the ds of Diocese is made up of Argyle, Lorn, Kintire, as the Lochaber, and some of the West Isles. Accorry of ding to Bilhop Spot/wood's Account, the first gend. Seat of the Bishop of the Isles was in the Isle ng atof Man: And when the Scots were dislodg'd year there, it was translated to Icolmkil. Others and disprove this. I shall say nothing of the Antiin the quities of that See, the Relations being fo eftor'd Rome.

⁽a) 1587. (b) Collections concerning the Scottifb History pl 273. (c) Act 2, Parl; 22. Ja. 6. doubtful.

doubtful, and different: But only notice that the old Evidents of the Bishoprick were lost, and no Vestige remained to instruct how many Dignitaries were in it. Which oblig'd the Parliament 1617, to appoint the Bishops Chapter and Council to consist of the Parson of Sorbie as Dean, the Parson of Rothsay as Sub-dean, and four Prebends, viz. the Parsons of Kilmoir, Cumrie, Kilraw, and Killean. The said Parliament annex'd the Priory of Archate tan, with the Abbacy of Icolmkil, to this Bis

hoprick.

7. It is own'd that Bishops at first lived with their Clergy about them in their proper Seats, or Cathedral Churches; where the stated Services, and publick Offices of Religion were only performed, and to which all the People of the Diocele considered as one Parish reforted, especially at the more solemn Seasons of Devotion; and that some Presbyters us'd to be lent forth into the Remoter parts a Itinerant Preachers, for dispensing of the Word and Sacraments to fuch as could not conveniently come to reap the Benefit thereof in the Episcopal College. Nor is it controverted that the Institution of Rural Parishes got up, to the end Pastors might notice more particular ly, the People committed to their immediate care. But then it is not so clear when, or by whom, this was first done. Some ascribe it to Pope Dianysius about the year 270; others, to Euaristus about the year 212. A third lost will not allow the Erection of Parishes to have been any fingle Act, but a flow and gradual Work

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(83) Work; the refult of some considerable time? and of several Causes. Telling us that some times the missionary Preachers found incouragement to fettle in a populous place, and by the liberal affiftance of the zealous Inhabirants, to raise up an Oratory, or Chappel for Divine Worship, with a little adjoyning Manse. Sometimes Princes erected Conveencies for Devotion at their Country Houses, called Royal Free Chappels, with fufficient Revenues to Priests to officiat there. But more requently Lords and great Men founded Churches upon their own Lands, for the use of their Families and Tennents: whereby he parishes were of no Larger extent, than he Founders Possessions. As these came to e Divided among more Proprietars, the new Masters obtain'd new Churches, with a paochial Circuit commensurate to their proper Estate. Pretending frequently that all their lefign in the Matter was to supply the Incon-Word eniencies of Distance from, and difficult nveniccess to the Ecclesia matrix, or the Original in the arith Church. These new Churches were verted herefore called Ecclesia succursales, auxiliary up, to Churches. But must not be confounded with icular Chappels of Ease: The former, and not the rediate latter, being free, and independent upon the or by Mother Churches. (*) For a Chappel of e it to lase was serv'd by some inferior Curate or

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^{(4) 6.} pracipimus 16. qu. 1.

the Chappelry were bound to testify their respect to the parochial Church, by partaking of the Divine Ordinances there, at Easter, Chrismass, whitsunday and other Festivals. Some considerable Heritors were also allowed to Erect and Indow private Chappels, and Oratories within their own Lands for the ufe of their own Families: They being always oblig'd to pay their Devotion at the Mother Church upon Festivals. So by Act of Parliament, all Persons were Ordain'd to Communicate once a year in their own Churches. In the Council of Toledo, the definite Limits of a Parish was to comprehend, at least decem mancipia. If there were fewer, that was ground to join the same to another Paril (b) And one Parish was divided in two, and a new Subfidiary Church erected in the cale of too many Parishioners, (c) or where fome lay at too great a distance from the Par rochial Church, or had difficulty of Access by intermediate Waters. (d) Anno 1560 The Ministers of the Reformation were distributed among the Burghs of Scotland. Folia Knox was appointed to serve at Edinburgh Christopher Goodman at St. Andrews, Adam Herit at Aberdeen. John Rom at Perth, William Christe fon at Dundee, David Ferguson at Dumfermins

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⁽a) Act 17. Parl 16. I. 6. (b) C. unio 10. 9. fr qu. 3. Bengeus de Benefic. ad verbum Militia cap. 4. N. 19 (c) C precipimus 16. qu. 1. et c. nulli dift. 99. Bengui ibid N 20. (d) C. ad audientiam 3. Extr. de Ecchi adificand. vel reparand. Bengaus ibid. N. 21.

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Paul Methvin at Fedburgh, Mr. David Lindfay at Lieth : Besides the Superintendants Ordained for Administration of Church Affairs, as Mr. John Spotswood for Lotbian and Merfe, Mr. obn Winram for Fife, John Areskin of Dun for Angus and Merns, Mr. John Willock for Glafgow, and Mr. John Kerfewel for Argile and Ifles. But vet the first Act of Parliament that I find for bounding the Ministerial Duty by distinct Paishes is the Act 100, Farl. 7. J. 6. King charles the first gave Order for dividing the Town of Edinburgh into four distinct Parishes. noon a Promise made in their Name, that hey should provide each Parish with two Ministers, and 100 Pound sterling yearly, with fufficient Dwelling-House, for the use of each Minister, But these Parishes are now ncreas'd to the Number of Eight, and every Ministers Stipend rais'd to 2500 Merks.

8. The Resolute Sufferings of Church-men inder Heathen Persecution, rais'd their Creit, and filled the World with such Tenderes, and Esteem for 'em, that every one trove to outdo one another in Acts of Libe. ality towards them. And as the Christian faith began to spread, and get footing in particular Nations under the benign influence and Countenance of fecular Powers: Churches vere built by Converts for the preaching hereof, and for Divine Service, more or less Magnificent according to the different Orders of Church men they were design'd for; and de Early lso indowed proportionally with Lands and offessions, or Lithes, or with both. Cathe-

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drals were built for Bishops; Collegiate Churd ches for fecular Canons, to fing Mass in; Parish Churches for preaching Priests; and in the wider Parishes, Chappels for private Devotion. Chanteries and Altarages were founded in Cathedral and Collegiate Churches for Maffifying; besides many single Prebends up and down, here and there. To promote this pious Fervour, the Ecclesiastical Canons, allowed to fuch as had either indowed a Church, or built it, or given the Ground to build on, a power to present Ministers to Supply the Cure, and injoy the Benefice, called the Right of Pacronage. Which was ex tended in favours of the Authors, and Indow ers of all other pious Foundations. But some deny that Patronage is acquired by the giving of the Ground only. I have no Room for Forraign Instances: There being so many in our own Countrey, which some times day could vie and compete with any in Europe for fine, and sumptuous Churches. I thall begin with the Cathedrals; after I have defir'd the Reader to notice once for all, that when we fee many Churches in Scotland still retain the Name of Saints, we are not thence to conclude that such Churches were erected by these holy men, or in their time: But that in honour to their Memory, they were them. long after Dedicated to them, upon the avairst B count of their being born, educated, or bu white ried near luch p laces.

9. B. Spot/wood, out of Boethius, tells us that (a)

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Cratilinto (a) erected in favours of the Christian Refugees under the last general Perfecution, a stately Church in the Isle of Man. with sufficient Revenues, called by the Name of Sodorense Fanum, or the Temple of our Saviour; and that the same, while the life of Man continued in the possession of the Scots. was the Cathedral of the Bishop of the Isles. who is thence stiled Sodorensis Epi/copus. yet it is scarce imaginable how a King of the Scots could rear up a Cathedral there for Strangers, while there was yet none upon the continent of Scotland near his own Palace. B. Lambertoun (b) finished the Cathedral of St. Andrews; which was as Mr. Slezer (c) observes, probably the Biggest in Christendom, being seven Foot longer, and two Foot broader than that of St. Peter at Rome, and for the beight and imbellishing of its Pillars and ime a beauty of its Stones, and the symmetry of its parts, my in was one of the best of the Gothick kind in the World. nes. I This Cathedral is now Demolished. John I have Achaian Bishop of Glasgow, built the Cathedral I, that there: But it was not quite finished till Willed I liam Babington's time. When the Magistrats thence once design'd to pull it down, & to build two erected or three Churches with the Materials on't; it is and opposed in Arms and opposed y west them. B. Spotswood says that St. Ninian the the act irst Bishop of Galloway built a Church all of or but white Stone, called St. Martines after his

us that (a) In the year 277. (b) In the year 1318. (c) In atilists is Theatrum Scotia.

Grand-Uncle the Bishop of Tour's, and after wards Whiteborn: from whence the Bishops of Galloway are stiled Episcopi Candidæ Case. But others disprove this Relation, and deny that St. Ninian was either the first Bishop of Galloway; or yet in a capacity to ered any fuch Church there. Mr. Thomas Lauder Bishop of Dunkeld, finished and dedicated the Church thereof in the year 1454, and magnificently ador'd it Anno 1010. When Malcolm Kininmouth was Bishop of Aberdeen, the Cathedral began to be built to the Memory of St. Machar. Alexander Kininmouth caus'd demolish that Church, as not being sufficiently Beautiful for a Cathedral, and laid the Foundation of one more magnificent; but did not live to finish it. Henry Leigton much advanc'd, and bestow'd vast Sums for the perfecting ofit. B. Lindsay Roofd it, and Pav'd the Floor; B. Dumbar Cieled it, and built the South Isle; And his Successor B. Stuart erected the Consistory-house. This Cathedral that had been a marter of Nine Score Years in building, did not last Twenty Years intire, when the Barons of Merns, in company with some Aberdeens Men, demolished the Chancel, and spoil'd the Church of all its rich Utenfils and Ornaments. Which being Shipp'd in order to be fold in Holland, funk, as my Author fays, not far from the Gridleness. The body of the Cathedral was preserv'd from Ruine by the Earl of Huntly. It is not certainly known by whom the Cathedral Church of Brechin was built. The Fabrick is pretty

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pretty handsom; but our first Reformers demoished the Chancel. Andr. B. of Murray founded the Cathedral Church of Elgin, one of the rareft Monuments this Nation can boast of: Which in length doth almost equal St. Pauls in London. and surpass it in breadth. Who built the Cathedral of Dumblane I know not, but Spot [wood lays, that Clemens, one of the Bishops thereof. restor'd it when decayed; And Michael Ochiltree another adorn'd it with rich Ornaments. Gilbert B. of Caithness Son to the Lord Duffus, erected the Cathedral there. I shail not tell who built the Cathedral of Channery, the Seat of the Bishop of Ross, because I do not know: But our first Reformers demolished it, and some part on't hath been since Rebuilt. for the Cathedral of Edinburgh, that vast and magnificent Structure called St. Giles, it was of old a Collegiat Church, and is now divided into four Parish Churches.

legiat Churches or Provostries. Those were founded and liberally indowed by Princes and great Men. King James the Third sounded the Chappel Royal of Stirling, consisting of Prebends and a Dean, whose Office is annex'd to the Bishop of Dumblane. James the Fourth erected the Provostrie of Restairing in Lothian. The Trinity Colledge Church in Edinburgh, was built by Mary of Gueldres King James the 2d's Queen, who lies there inter'd. Kirkbugh in St. Andrews, was founded by the Earl of Fife. Dumbar in Lothian, by the Earl of March; And Cara

Carstorphine by John Forrester Barron of Carston phine. Dumbartoun in Lennox, by the Earl of Lennox. Lincluden in Nithsdale, by the Earl of Dowglass: Chrichtoun in Lothian, by the Earl of Bothwel. Abernethy in Strathern, by the Earl of Angus. Tayn in Rofs, by the Earl of Rofs, Minnibol in Carrict, by Sir Gilbert Kennedy, Methven in Strathern, by the Earl of Athoh. Dirletoun in Lothian, by Sir Walter Halyburtoun of Dirletoun. Dunglas in the Merse, by the Earl of Hume. Seaton in Lothian, by the Lord Seaton. Kilmaures in Cunningham, by the Earl of Glencairn. And Rollin in Lothian, famous for its curious Workmanship, by William Sinclair Earl of Orkney. There goes a Tradition concerning the Chappel of Roslin, That it appears all on Fire before the death of any of the Family of Rollin. Many of the above-mentioned Colledge Churches fell to the King by the Forefaulture of the Founders. Collegiat Churches began to be built after King Alexander the Third's time, when the erecting of Monastries was discouraged by the Popes usurping the Right of Patronage. The chief Church in great Towns was a Collegiat Church; As St. Giles in Edinburgh, &c. All the Collegiat Churches within the Freedom of the Town of Edinburgh were gifted to that City by Queen Mary, the 13th. of March 1566, and the Grant was ratified by King Charles the First in the year 1636.

founding of Collegiate Churches, contented themselves to found and endow Chappels, and Chappelries, and Altarages. There are many

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Chappelries in Scotland, as the Chappel Royal at Halyroodbouse, our Lady of Loretto's Chappel near to Musselburgh S. Katharins Chappel befide Edinburgh, the Cristal Chappel at Dumfreis. &c. Mr. Thomas Lauder Bishop of Dunkeld founded a Number of Chappels and Prebends: fome in his own Diocy, and others in Edinburgh. The Town of Edinburgh, at the Reformation, got a Grant of all Chappelries, Prebendries, and Altarages within their own Freedom. King Fames 6, in the Year 1572, mortified to the Town of Brechin, for the uses of their poor, all the Revenus belonging to any Chaplainrie or Altarage within the Cathedral Church of Brechin. But in a Declarator at the Instance of the Laird of Findourie against the said Town, (a) for declaring the Lands of the Chappelry of Coldhame to belong to him, as having Right by progress from the Chaplains of Coldbame: The Lords declar'd in his favours; in regard he was infeft upon the Kings Confirmation Charter, before any Infestment taken by the Town upon their Gift of Mortification.

giate Churches and Chappelries; I shall, in the next place, give some Instances of the Foundations of Parish Churches. It is reported, that one Regulus a Grecian having, in pursuance of Orders given him in a Vision, put out to Sea in company with some of his Collegues, carrying the Arm Bone, three

⁽a) February 1682.

(92)

Fingers, and three Toes of the Apostle S. An. drew in a little Box. And after they had long fuffer'd under the horrid Storms of ill Weather, being cast into that Port of Fife, now called S. Andrews, without any thing fav'd but the Relicts: Hergustus King of the Piets entertain'd them nobly, and at their de. fire erected a Church, which to this day bears the Name of S. Rule from Regulus. Upon whom that Prince bestowed his own Palace with Lands adjacent. About the Year 800 Hungus King of the Picts having obtain'd a fignal Victory over the West Saxons, at Athelstane Foord near Haddingtoun; which, according to the common Story, was foretold to him the Night before in a Vision by the Apostle S. Andrew, and facilitated by the appearing in the Air of a Cross in the Form of an X, as soon as the Battel began: Hungus, in Acknowledge ment of this Victory, not only bestow'd on S. Rules Church many rich Gifts; But alfo (ace cording to Spot [wood) restored the Tithes to Church-men. Tho Buchannan will have it, that he only gifted to S. Rule the Tithes of the Crown Lands: Which Feredeth the Third from Hungus Revoked. Achaius King of the Pias did aifo, in commemoration of the foresaid Airy appearance of S. Andrews Cross, institute an Order of Knighthood in Honour of S. Andrew, who, in times of Popery, was reckon. ed the Tutelary Saint of Scotland. This Order was in a manner obliterated, till reviv'd by K. James 7, who created some Knights of S. Andrew: Which our present Queen hath likewile

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likewise done. Boniface an Italian (who came into Scotland about the Year 697 to make our . acquaintance with the Church of Rome) built to the Memory of S. Peter a Church. where he landed at the mouth of a little Water betwixt the Shires of Angus and Merns; erected another Church at Telin; a third at Reftennoth; and a fourth at Rolemarkie, where he thought fit to refide, and was buried. Spot [wood fays, that Padie Church at Forden was built by Palladius, from whom it took its Name. Malcom Kenmure built the Church of Dumferma ling. K. Alexander I. built S. Michaels Church in Scoon. The Parish Church of Elgin dedicated to S. Peter, was founded by George the second Earl of Huntley about the Year 1490. Robert Ballendein Abbot of Halyroodhouse built the South Church of Leith, &c.

12. Patrons of Parish Churches frequently annex'd them with their Endowments to Cathedral and Collegiate Churches: Thinking thereby to acquire a more splendid Degree of Merit. The Church of Cortoguby was annex'd to the Bishoprick of Brechin by Walter Pallatine of Stratbern, Earl of Atbole, Lord Brechin and Cortaguby. The Tithes of the united Parishes of Dumbarnie, Pottie, and Moncrief in Perth Shire belong'd to the Provoftry of S. Giles. The Parish Churches of Sautry, Fala, Lempetlaw, Weems, Kirkurd, Ormestoun, and Gogar were annex'd to the Trinity Colledge Church in Edinburgh. The Churches of Lintoun, Duns, and Chirnside, with their Chappels, were united to the Collegiate Church of Dum-

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bar. The Churches of Dalmahoy, Haltoun, and Boningtoun were annex'd to the Provoftry of Carstorphin. Some Parish Churches were united to Colledges by their Founders. So Fames Kennedy Bishop of Saint Andrews annexed the Churches of Cults, Kemback, Dininno, and Kilmeny to S. Salvators Colledge founded by him. The Cure of these Parish Churches annex'd was supplied by Vicar Incumbents. Who at their first Institution had no fix'd Stipends. but only what the Parsons (whom they did personate and represent) was pleas'd to give them, as a Reward for their Service: And were put in for a time, to serve the Cure during the pleasure of the Representative Parlons. I call the Prelates of Cathedral and Collegiate Churches, Representative Parsons, to distinguish them from those who serv'd the Cure themselves in their own Parish Churches, and enjoyed the full Rents thereof. Sometimes, the Patrons of Churches, who were not qualified to serve personally, and some Parsons that had Pluralities, or found themselves Infirm, I had almost said Lazy, got leave to officiate by Substitutes and Vicars. The Church finding Temporary Vicarsinconvenient, oblig'd fuch as discharg'd the Spiritual Care of Churches by Deputies, to plant, for preventing Abuses, perpetual Vicars or Curates in them: So called, because they continued during their Lifetime, and had Curam Animarum. I find a third and worse kind of Hirelings had also crept into the Church in times of Ignorance and Superstition, under the Name of Presbyte-

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out any Title: Which practice was condemn'd as an enormous Abuse. (a) Sometimes only the Patronage of Parish Churches and Inferior Benefices, was mortified to Cathedrals, and Provostries; to which the Prelates presented Parsons.

14. When the Monks and Nuns got up. and began to draw together into Monastries. they gain'd fo upon the minds of people by an outward hew and profession of more than ordinary Strictness and Holiness of Life; that there was a general forwardness every where to make liberal provision for them. Every body being posses'd with a fancy, that the prayers of so many devout Men assembled in one place, would stand them in great stead, parted cheerfully with their Lands, and Tithes to Monastries: Others run into them, taking their Patrimony with 'em. Yea, that vain Opinion concerning the Merit of good Works, and Intercession of Saints so prevailed upon the Superstitious World; That our Kings, and Countreymen with their consent, frequently mortified Churches whereof they were Par trons, with all the Endowments of Lands and Tithes, to Religious Houses. King David bestowed the Church of S. Cuthbert upon the Abbey of Halyroodbouse. King Alexander gave the Church of Lanerk, with the whole Lands, Tithes and Pertinents thereof, to the Abbacy of Dryburgh. William Lambertoun Bishop of S.

Andrew;

⁽a) C. quoniam enormis 3: Extr. ne prelati vices.

(96)

Andrews gave unto the Priory there, the Churches of Dairley, and Abercromby; and procur'd to it from the King, the Church of Fordon in Mernis. Nicolaus B. of Dumblane gave the half of the Church of Strowan to the Abber of Inchaffrey. The Church of Kincardin was confer'd on the Abbacy of Sambuskenneth; and the Church of Fiswic upon Coldinghame. K. Malcom 4. granted a Charter to the Monastry of Dumfermling of the Tithes of Perth. Parish Churches of Athelstanefoord and Crail were annexed to the Priory of Haddingtoun, Many Grants of this Nature are to be feen in Nay, 28 Churches belong'd to old Charters. the Monastry of Pasley; 36 to that of Kels; and 32 to the Monastry of Aberbrothock. annexing of Churches with their Revenues to Abbacies, or Priories, the King and Bishop Confirmation was adhibited ; In regard their Jurisdiction, Rights and Casualities were there by impaired. These annex'd Churches were ferved by Vicars put in by the Convent Abbeys got sometimes the Patronage only of Churches mortified to them: And the Abbots presented Parsons for supplying of these.

15. Princes and great Men not fatisfied to enrich Religious Houses already founded, were acted and carried by a strange Zeal to erect new Monastries, and Nuneries, and to endow them with Lands and Tuhes: As the most compendious way to save their Souls. wave the many Religious Foundations made by Scots Men in other parts of Europe, particular larly

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larly in Germany, where, Buchanan (a) tells us that Scots Men, even to his time, were Governours of these Monastries: And only notice what hath been done of that Nature at home among our felves. Columba founded the Monastry of Icolmkil in Iona one of our Western Illes: where the scattered Monks were first gathered together under one Roof. This Monaftry, which borrows its Name from Cella Columbe, became famous in succeeding Ages by the Royal Bounty of our Kings; and had a fort of Jurisdiction over the rest of the Monastries for a long time. This was the Burial place of our Kings from Fergus 2. to Malcom Kenmure, where 48 of 'em ly interr'd. It was united to the Bishoprick of the Isles in the Year 1617. The Abbacy of Dumfermling was founded by King Malcom 3, who lies buried there. In the Erection whereof certain Lands were referv'd to the Keldees. At the general Dissolution it was first given to Secretary Pitcairn, then to the Master of Gray, and lastly confer'd on Alexander Seaton, who by King James was made Earl of Dumferling. The Lordship of Musselburgh, a part of the Lands of that Abbey, was erected in favours of the Lord Thirlftane; and excepted from the general Annexation 1587. The Abbey of Coldinghame in the Merfe, which had once been plenished with Virgins, was erected into a Priory by King Edgar; and into a Lordship in favours of Alexe ander Hume by the Parliament 1606. King

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Alexander the First, Sirnamed The Fierce, found ed the Abbeys of Scoon in Gowrie, and S. Colm, or Inchcolm in the Firth of Forth, and a Priory at S. Andrews in Fife. The Abbey of Scoon (where the Fatal Marble Chair, the Coronation Seat of our Kings once flood) was erected into a Temporal Lordship in favours of the Earl of Gowrie, upon his own Son the Commendators Refignation. But that Family being forfeited, Sir David Murray Comp. troller to K. James 6. was created Lord of Scoon, and then Viscount of Stormonth. The printed Table of the unprinted Acts 1609 mentions the Erection of S. Colm to the Lord S. Colm: But there is nothing of it in the Regifter. The Lord Down, whose Successor is now Earl of Murray, was Commendator of Incheolm after the Reformation, and got the same erected in his favours. The Priory of S. Andrews was erected to Ludowick Duke of Lennox Lord high Chamberlain, and Admiral of Scotland. But King Charles the First afterward annex'd it to the Bishoprick. And in time of Episcopacy, it was the Primates Palace. K, David, commonly stiled Saint David, exceeded all others in his Immoderate Profuseness upon Monastries: Being just such another Religious Spend-thrift as Constantine the Great. He erected and endowed the Abbeys of Jelburgh, Kelfe and Melrofs in Teviotdale; New. bottle and Halyroodboufe in Lotbian : Kinlofs in Murray, Cambuskenneth in Stirling-Shire, Dundrennan in Galloway, Holm in Cumberland: Befides two Monastries at Newsastle; and two Nuneries

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Nuneries, the one at Berwick, and the other at Carlile. Whereby S. David, with what he bestowed on Bishopricks, so clip'd the Royal Revenue, and impoverished his Successors, that King James the First was ordinarly heard to fay of him, That he was a fore Saint to the Crown. The Abbey of Jedburgh, except the Kirk Lands of Dalmeny, was erected (a) in a Temporal Lordship to the Lord Hume, and afterwards to the Lord Roxburgh. The Abbey of Kelfo was bestow'd upon the Earl of Bothwel; and he being forfeited, was annex'd to the Crown. But afterwards dissolved and erected in favours of Roxburgh. Melross was gifted to Thomas Lord Binning, afterwards Earl of Melross, and at length Earl of Haddingtoun. By whom the Church Lands of Cavers, a part of the Abbacy, was disponed to William Dowglass of Cavers. The Abbey of Newbottle was erected in a Temporal Lordship with the Superiority of Prestongrange to Mark Ker Lord Newbottle, afterwards Earl of Lothian. But Monkland befide Glasgow which belong'd to this Abbey was disponed to the Earl of Haddingtoun. Holyroodbouse was erected in favours of John Bothwel, Son to Adam Bishop of Orkney, and is now her Majesties chief Palace in Scotland, Kinlos in Murray (formerly called Kilflos, from the plenty of Flowers there) was made a Temporal Lordship in favours of Mr. Edward Bruce Commendator of the Abbey: Whole Son King Charles 1. created Earl of Elgin; and on his

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⁽a) Anno 1606.

Grand Child King Charles 2. confer'd the Title of Earl of Alisburry in England. Cambuskennesh was erected in a Temporality to John Earl of Marr. King Malcom 4. Sirnamed The Maiden founded the Abbey of cowper in Angus, Soutrey in Lothian, and the Priory of Manwel, Cowper was erected to the Lord Balmerino's second Son, and Manwel to the Earl of Lithgow. King William erected the Abbey of Aberbrotkock in Angus to the Memory of Thomas Becket Arch-Bishop of Canterbury, This Monastry was one of the richest in our Nation; and for its sake, King John of England granted to the Inhabitants of the Town of Aberbrotbock, the same priviledges through all his Kingdom, except in London, that his own Subjects did enjoy. This Abbacy was erected in a Temporality in favours of Fobn second Son of the Duke of Chattelrault, afterwards Marquis of Hamiltoun. But now belongs to the Earl of Panmure. The Abbey of Lindoirs was also founded by King William, in Memory of the safe Return of his Brother David Earl of Huntingtoun from the Holy War; and that of Balmerino by Emergard his Queen. The former was erected to Patrick Lord Lindoirs, Brother to the Earl of Rothes; and the latter in favours of the Lord Balmerinoch. The Monastry of Passey in the Barony of Renfrew in Clidsdale, was founded by Walter high Stuart of Scotland in the Year 1160. The Monks there wrote a Chronicle of Scotland, com monly called, from its Cover, The Black Bok of Pastey, This famous Monument of Antiquity

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quity Lambert got out of President Spotswoods Library after his Death, and carried it with him to England. The Abbey of Passey was at the Reformation confer'd on Claud Hamiltoun third Son to the Duke of Chattelrault. Crofregal or Rules-cross a Monastry in Carrick, was founded by Duncan Earl of Carrick; and united in the Year 1617 to the Bishoprick of Dumblane. Gilbert Earl of Stratbern founded the Abbey of Inchaffrey; to which he gave the third of his Inheritance. Dernagild Daughter of Allan Lord Galloway fet up the Monastry of Newabbey, or Dulcis Cordis in Galloway. Mr. Gilbert Brown last Abbot thereof descended of the House of Carsuth, died an Exile at Paris. This Abbey was erected in favours of Sir Robert Spot (wood President of the Session. From whom it was purchased by King Charles r, and annex'd to the Bishoprick of Edinburgh. Malcom Mackduff Earl of Fife erected the Monastry of Culros in Pertb-Shire: Where S. Mungo is faid to have been a Monk. It was erected in favours of the Lord Colvil By Duncan Earl of Fife there was a Priory for Nuns founded at Northberwick in Lothian; and another at Haddingtoun, by Ada Countess of Northumberland, King Malcom the Fourth's Mother. The Priory of Haddingtoun was erect-. ed to John Matter of Lauderdale. The Abbeys of Kilwinning in Cunninghame, and Dryburgh in Tividale, were founded by Hugh Morevil high Constable of Scotland. The first was erected in favours of the Earl of Eglingtoun, and the latter to Henry Erskin, a younger Son of Jobn Earl of Marr Thefaurer, thereafter created Lord Gardrofs. The Monastry of San. del in Kintire, was founded by Sowr Maclerdy, The Abbays of Soulfeat, or Sedes Animarum. Glenluce, and Tungland, all in Galloway, were founded by the Lords of Galloway: The first by Fergus, the fecond by Rolland, and the last by Allan. The Monastry of Holywood in Gallo. way, was founded by Dercongal, and belong now to the Earl of Nithsdale. That of Dere in Buchan, was founded by William Cumming Earl of Buchan. And Fern in Ross, by Fergubard Earl of Rols. The Abbey of Dere was confer'd on George Earl of Marshal, to be called the Lordship of Altrie: As a Gratification to him for faithfully Discharging his Embassy to Denmark about the King's Marriage. Fern was annex'd to the Bishoprick of Ross by the Parl, 20. fa. 6th. (a) King Alexander the Second sounded the Priory of Pluscarden in Murray. The Lord Biffet that of Beawley in Rossishire and Duncan M'coul Archattan in Lorn. The Lordship of Urgubart was erected out of the Priory of Pluscarden. This Priory of Archattan and the Abbacy of Icolmkil, was united to the Bishoprick of the Isles. (b) The Priories of Whithorn and St. Mary Ifle in Galloway, was founded by Fergus Lord Galloway; and erected in favours of the Laird of Isle. Whithorn was famous for the great refort of Pilgrims that came there to pay their Respects to St. Ninian's Sepulchre. The Crofs-kirk of Peebles in Tweddak,

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was founded by King Alexander the Third: By whom also the Priory of Urgubart in Murray was founded. The Priory of Monimusk in Marr. was founded by the Bishop of St. Andrews. The Priory of Strapbillan in Athole, was founded by King Robert Bruce. The Priories of Trefontany and St. Bothan in Lammermore, and Eccles in the Merle, by the Countess of March. Ecclis was erected in favours of Sir George Hume afterwards Earl of Dumbar. The Priory of Lincluden in Galloway, was founded by Utbred Lord Galloway. The Priory of Elgubow in Stratbern, by David Lind(ay Ancestor to the Earls of Grawfurd. Nay, King James the First himself, who complain'd so much of the Prodigality of former Kings, in exhausting their Treasures to inrich Monastries, could not yet refrain from building a beautiful one at Perth for the Carthusians, and bestowing large Revenues upon it. Which Convent was afterwards known by the name of Charter-house, and was the first that was pulled down at the Reforma-I have heard the Monastries in Scotland reckoned to be about Seventy in Number, whereof Fourteen were posses'd with Women; Thirty govern'd by Abbots, and Twenty-fix by Priors. But in a word Nulla Regio, as the Learned Craig (a) observes, In hoc nostro Regno fruments aut rerum aliarum ad usum bumanum necesariarum ferax, in qua locus præcipuus ad bæc monachia destinatus & extructus non erat. There was fuch an humour in the Nation for building

⁽a) Lib; I. Feud: dieg: 11.

of Cathedrals, Monastries, and Religious Houses, That, as one pleasantly observes, from the year 1100, when first the Kingdom was divided into distinct Bishopricks, till the Resormation, the voice of the Gospel could not be heard for the noise of Hammers and Trowels. We find no new erection of Monastries, except the Carthasian-bouse at Perth, after the time of King Alexander the Third. The Pope's Incroaching upon the Right of Patronage referv'd by the Founders in their Foundation-Charters, diverted the Thoughts of persons inclin'd to Pious Liberality from building of Abbacies, or Priories, to the setting up of Col-

legiat Colledges.

16. The Possessions of Ecclesiasticks about the Twelfth Century, came to be term'd Benefices: Because they flowed most from Pious Bounty and Liberality. Germany is the place of the Christian World, where generally Church men possess the greatest Estates. But even in Seotland, the Clergy confifting of Bishops, Priors, and Abbots, had such Weight and Interest in the Governmet, by Reason of their vast Wealth and Possessions; That they became a third Estate in Parliament, where they made Fifty Three Votes: And were most justly subjected to the payment of the half of the Taxt-Rollin all publick Impositions. They were Lords of Regalities, and had their Baillies under them, who judg'd in Causes civil and Criminal within their Districts. But I notice this Difference betwixt Ecclefiastick and Laick Regalities, that the latter included a Power

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(a) Act. 49. I

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Power to Repledge from the Sheriff or Justice General, tho not prevented by the first apprehending or citing of the person; Whereas the Baillie or Steward of an Ecclefiaftick Regality. could only Repledge, if he had prevented the Justice General or Sheriff; When Popish Or ders were supprest, the Benefices with annex'd Regalities, were given to Lords of Erection: But with no more power of Repledging, than the Church-men had. Only they were allow'd the Escheats and Fines, even of those condemn'd by the Justices. (a) The Ecclesiastick Indowments confifted in Tithes, Lands, Fishings, and perhaps some other Possessions. But I don't find that our Clergy had any Interest in Ships. St. Augustine (b) refus'd to increase the Revenues of his Church by a Stock in Shipping: Because Sea-men in the case of a Wrack, are often put to the Question, and vex'd with Law-Sutes, unbecoming the Meekness of the Church. But in Italy and Alexandria, the Church had many Corn-ships for transporting Provisions to the Poor. (c)

indowed; several Canonical Decrees were made by Popes and Councils, against the Alienating of church Lands or Tithes. Which our Law-givers have copied after in their Acts of

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⁽a) Act 29. Parl: 11. Ja: 6. Mackenzie Observ: on the said Act. Idem crim: tit: Jurisdiction of Regalities, S. 6. (b) Serm: 49. De diversis. (c) Thomassin la discipline de l'Eglise part: 2. chap: 4. N. 3, 4, 5.

Indowment

Indowments of Bilhopricks, Churches, and Rei ligious Houses: It falls next to be considered what were the Ways and Means us'd by Monks and Priests, to induce persons to that superstitious kind of Prodigality; Then what Effects it had. It was ordinary with these Reli. gious Quacks to possess the consciences of the richer Sort with the Doctrine of Merit: Telling that the common Law of Gratitude re. quir'd the bestowing a part of GOD's Libera. lity to them, upon his Servants and Service; And that the easiest and cheapest way to attone and compound for a finful life, was to mortify, when they were dying, to pious Uses, some part of that Worldly Lumber that could no longer be otherwise useful to themselves. And that it was better to part with it fo, (fince leave it they must) than in Favours of any person upon secular Confiderations; or even to their own children, who perhaps might debauch the same to bad purposes, to the eternal ruine of themselves and others. Which could not chuse but be an aggravation of guilt upon the Defunct, for having so contributed thereto by the disposing of his Fortune. When they found the dying person coming to the Lure, and resolv'd to give, but debating with himfelf how much; their way was cunningly to fuggest that, since the exact proportion betwixt our fins and our alms, could not be certainly known, it was the fafest course to give all he had as an Expiation for all his fins. None were more dextrous, and made a better hand at this Sharping Trade than the Begging Friers, who.

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who, for all their profes'd poverty, were more justly term'd Manducants, than Mendicants. And gave a fair Proof of their Piety and Honesty after Flowdown Fight, when they apply'd to their own use that great Treasure deposited with them, by fuch as dropt their Carcafes in that Fatal Expedition. 'Twas partly to secure dying persons against the Importunity of these Impostoures, that the Law of Death-bed was introduc'd. (a) The third Council of Chalon (b) condemns those Church men who make ule of Cunning and Artifice, to draw Gifts from the People in Favours of the Church. And by a Capitular of Charles the Great (c) Ecclefiafticks are discharg'd upon their perril. to accept of Mortifications, whereby children would in Effect be difinherited, and cut off from succeeding to their Parents Estates. So. good St. Augustine refus'd universal Legacies in Favours of his Church, when the Testator left children or Parents, who might be prejudg'd, and suffer thereby. (d) Nor was Augustine's Generofity fingular; For a certain Man who had no children, nor hopes of any, having gifted his Estate to the Church of Cartbage. with the Refervation of his own Liferent; Aurelius the Bishop repon'd him to his former Right, upon the unexpected Birth of a Son. (e) This is confonant to the civil Law, which is more Favourable to children, than to a pious

Caule.

⁽a) Stair Instit: lib: 3. tit: 4. §. 27. lib: 4. tit: 20. §. 38. (b) Can: 6, 7. Anno 813. (c) L. 1. C. 89. (d) Thomassin lbid: part: 1. liv: 3. chap: 8. N. 2. (e) Ibid: N. 5.

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canse. (a) Because Monks would not labour their Lands themselves, they frequently granted Leases of 'em, called Convenientiae, for a certain number of Lives, for payment of a yearly Rent or Duty. and sometimes Benefactors got from Monastries Back-tacks of Lands or Tithes they had given them, for six or seven Lives called Litera Precariae, on condition of paying an easy yearly Duty: And after expiring of that Lease, the Monastry had the absolute disposal of 'em. This method contributed much to the Inriching of Abbeys: For People parted more willingly with their Estates, when they saw that that they still reserved the Prosits of them for many years.

19. Now I shall give an Account of the Mischievous Effects and consequences of heaping fo great Riches upon these Ecclesiaflicks and Regulars; which verified that faying of Sulpitius Severus, Auro non ftrui Ecclesiam, fed destrui: For as was antiently observ'd, Religion brought forth Wealth, and the Daughter de-Broyed the Mother. At this Door, first Laziness with a Train of Abuses, and then Ignorance enter'd in upon the Church. Prelats came to disdain preaching, and that they might oblidge the preaching Fryers, (who had a mighty stroke with the people) to represent them as of a pious and charitable Dispolition; gave away and impropriated, most of their own churches to Abbeys, leaving a poor priest to serve the parish, The parish

⁽a) Arg: Authent: si qua mulier, C. de SS. Ecclesiis.
priests

(109)

priefts also scorning to do their own Work. hired the begging Friers to do it for them: who in their Sermons strangely abus'd and impos'd upon Mens Consciences by the fophisticate Doctrines of merit, supererogation. purgatorie, &c. For Gregory the Great having about the end of the fixth Century invented Purgatory: Oblations were allowed to be made for the Ranfom of Souls out of that place of Torment. 'Tis strange to think of the vast Riches the Clergy acquired by their prayers and Masses on that account. But in a course of some years, they wholly refigned themselves to pride and luxury. Church-benefices were only confider'd as posts of Honour, and profit, to which Men did aspire by all the basest methods of Simony, & servile compliances: and when they were poffels'd of em_ all their thought was taken up with intrigues of State, and how to serve and Gratify their by-ends of Pleasure, Avarice, and Ambition. 'Tis incredible to what degree corruptions and abules were carried by Refignations in faworem, Unions, and Commendams, dispenfing with pluralities, and non-residence, and making Bishops and Abbots of the ignorant children of Noblemen. The Clergy by little and little withdrew from their Obedience to the civil Magistrate, and appeal'd on all occafions to the See of Rome. The Pope loving to have it so, supported them in their Disloyalty and indulg'd their Vices. This was the state K. James the first found the Church in, when he came to the Throne: which that wile Prince

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Prince cured in some measure, by incouraging Learning and Learned Men. But the publick Treasurie had in former times been so drain'd, and the Crown Patrimony lessen'd by Religi. ous Foundations, and provisions, that he could hardly find Mony out of his own Rents to pay his Ransom; And Queen Mary was forc'd, as we shall hear, to pare a Third off Ecclefiaftick Revenues to maintain the Expenele of her Government, and the Orthodox Ministers. Some Popes had shown an Inclination to the Reforming of diverse abuses in the Church of Rome: but were diverted from their Resolution by a State politick, fearing that the amending and acknowledging of fome corruptions, would be a publick confession that the Church had Erred, and draw more changes after it. So that in stead of removing Abuses, all were justified and main tain'd.

clergy grew intolerable in Scotland, through the universal prevailing of Ignorance and impiety; and Monastries which had been sounded for pious and charitable uses, turn'd nurseries of Vice: The only Wise GOD put it in the Hearts of some to breath after a Reformation; who with the Danger of their Lives made open profession of the Truth, and zeal-ously preach'd down Error, Superstition, and Idolatry. These were countenanced and supported by a considerable party of the Nobility and Gentry, who went under the Name of Lords of the Congregation: The Resormers challeng'd

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challeng'd the Popish clergy to Dispute upon the controverted Points of Religion, particularly the Mass, to be decided from the Scrip? ture : But they refused to be Determined by any other Rule than the Authority of Councils and the Canon Law. The people did Interpret this as a Distrusting of their Cause; and cry'd out, What have we any more to do with Idols and Monastries: And do what the Queen Regent could, with her Forces, they Invaded all cloisters and Monastries in the Kingdom, which they Spoiled and Demolished; beginning with these at Perth. pulled down Altars, and rifled Curches of their Images, and other Idolatrous Trash, and Superstitious Pageantry. But the Fabrick did not fuffer so much by them: For no Country parish Church was Demolished; and seven ral others were also spared and left intire. As in Glalgow the Cathedral, and in Edinburgh St. Giels, the Colledge Church, Abbey Church, and Magdalens Chappel. Few also of the Abbey Churches were totally pulled down; but generally as much was left standing, as suffic'd for the use of the Minister and Congregation : as it is in Jedburgh, Kello, Melrofs, Coldinghame, Haddingtoun and elsewhere.

21. The Reformation began in Scotland in the year 1558, and the Popes Jurisdiction and Authority was Abolished by Act of Parliament, 24 August 1560. Which was Ratified by the 2 Act of King James the sixths first Parliament 1567. And all persons Discharged to make Application to Rome for

Gifts

(112)

Gifes or Rights to any thing in Scotland, un der the pain of Barratry; that is Banishment and Infamy. Yet feverals did purchase antedated Grants and Priviledges from the Pope; and others did forge and counterfeit : Think. ing thereby to injoy Benefices after the decease of the then Possessors, to the great prejudice of the King, and the Reformed Ministry. In order to Remedy this inconveniency, and discover the Imposture, all Bulls, Provisions, Confirmations, and Gifts of Befices granted by the Pope, were Ordained to be produced before Commissioners appointed by His Majesty, to be Registrate and marked, if found true and lawfully purchased before the 24 of August 1560: otherwise to be declared null and insufficient in all time coming. (a)

creas'd, and proselyted severals of the Popilistergy: and these were suffer'd to injoy their Benefices during life. So Mark Ker the last Abbot of Newbottle imbrac'd the Reformation, and became Commendator. By the Act of Annexation 1587, the Conventual Brethren of the Abbey of Dumsermling, were no ways to be prejuded of their Portions during their Lifetime. But some thought sit to joyn the Reformers, and imbrace the Protestant Religion, merely as a Politick to keep themselves in possession of their Benefices. So did Patrick Heburn Bishop of Murray, to save his Absolute the Protestant Religion of their Benefices.

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⁽a) Aff 31. Parl: 3. 74. 6.

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bey of Scoon, whereof he was Commendator for when that came accidentally to be burnt, he foon revolted to his old way. Upon the Death of any of the indulged Beneficiaries, the King presented a Laick in his Room; the portions of such private Monks and Nuns as had deceas'd fince the year 1560, or should die at any time thereafter, before the Abbeys, priories and Nunneries had fallen to the Crown by Decease, Forefeiture, or Deprivation of the then present Possessors, were by the 127 Act, 8 Parl. Ja. 6. declared to belong to his Majestie, and appropriate as a help to establish a Royal Troop of Horse Guards. But his Majestie dispon'd them to the Lords of Erection within their leveral bounds, and retained only Right to the Portions, of fuch as died within Abbacies and Priories not erected.

the Exercise of their Pastoral Charge with unwearied Diligence: But without any certain Stipend for some years after the 1554, when fohn Knox came into Scotland. By an Act of privy Council in Queen Maries time, all Benefices not exceeding two Hundreth Merks of yearly Rent, were Ordained to be disponed to qualified Ministers: which was Rarifyed by the 52 Act, Parl. 3. J. 6. And asterwards extended to all Benefices of cure under prelacies, (a) Some Ministers again

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⁽²⁾ Act 102. Parl. 7. 3. 6.

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were provided to prelacies, and these were all lowed to fit and vote in Parliament. (a) Likewife for the Ministers in general their better Provision: and because the ordinary Crown Rent lufficed not to defray the Charges of Queen Maries House: The Prelats and other popils Ecclefiasticks, were dealt and prevailed with by the Lords of Privy Council, to refign in her Majesties hands, a Third of their Benefices, upon being infur'd of the two parts free of the Reformed Ministers Maintenance. during their Lifetime. They faw the Provision on of the Ministers would surely fall as a Burden upon their Copy-holds: And therefore fuffer'd the paring of their Nails to the Quick to fave their Fingers; being content to part with something for fear of losing all. Upon their Resignation, an Act of Council was made, Ordaining the third of the Rents of all Benefices in Scotland, to be applyed in the first place to the maintenance of Ministers; and the Superplus to Support the publick Affairs of the Nation; and Prelats and other for that effect, to give up Rentals of their Benefices to a certain Collector and Clerk. Reni tals, but undervalued, were accordingly given up by most part of em, and Recorded in three Rental Books; but some did not at ail compear. Queen Mary afterwards granted Discharges to severals of their Thirds, and the Ministers came to be reduced to great straits, through the not payment of their Sti-

(a) 48 231, Porl. 15. 3. 6.

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(115) pends? Therefore by the 10 Att, first Para iament, J. 6. It was Statute, that in time coming, ay and while the Church came to the full possession of their proper Patrimony, the Tiends, the whole Thirds of all Benefices hould be first payed in to the Collectors of Ministers Stipends (who were yearly to compt in Exchequer for their Intromission) hat the Ministers might first receive their particular Stipends, and the Reff or Superplus go to the King's ufe. Whereof there was yearly Book made, which altered, and was more or less, according to the quantity of Stipend bayed to Ministers; and was the King's Colectors Rule to Charge for the Superplus due o his Majestie: with which he used also to harge for Benefices omitted, or undervalued i the upgiven Rentals; and for the Rents f common Kirks, or for their Lands that vere also destinated to the foresaid uses, and xigences of Church and State. For the beter payment of Thirds, particular Localities vere affign'd in every Benefice, called The sumption of Thirds. And beneficed Persons ere incapable to fet Tacks of the particular ents affum'd, or to grant Pensions forth percof: All fuch Tacks and Pensions being cclar'd null, by Act of Council in February 87, which was Ratifyed in Parliament In order to the Distributing of e Thirds among Ministers, a Commission as pass'd under the King's Seal, to some of Nobility and Ministry, for meeting at planted

planted Churches. These Commissioners were called The Plat, and fat yearly in Novemba till Bishops were restor'd. (a) I come next to confider how the two parts of Benefice were dispos'd of till that time.

24. When the Ecclesiastick Beneficiaries, who had Right to their Benefices with the burthen of Thirds came to die; the King presented Laicks, who had been most active in the Reformation to these Benefices: who the R were called Commendators, and not only inledge joyed all the Profits and Casualities, of both many Spirituality and Temporality thereof; but alfo fat and voted in Parliament, as Bishops of Abbots, or Priors, according to the Dignity of the Benefice. So the Lord Down, whole Successor is now Earl of Murray, was Commendator of Inchcolm after the Reformation; and Mr. Edward Bruce, the Earl of Elgin's Father was Commendator of Kinless; and Mr. George Buchannan our Historian Commendator of Crofregal; and Mr. William Melvil Commendator of Tungland and Killwinning. But in regard as simple Usufructuaries, they could not transmit to their Heirs, these Benefices whereof they were Titulars; they got them erected in Lordships and Baronies. However this was not done with fuch a careless and un diffinguishing Liberality as some would have sis believe King Henry the 8th bestowed the

(a) Anno 1606.

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Abbey Lands in England. (7) Popish Bener fices here not a few, were by King and Paraliament confer'd on Burghs Royal, for the pious Uses of maintaining their Ministers. Colledges, and Hospitals. Many Churches ciaries, were united to Colledges in particular: as the Church of Forteviot to the old Colledge of St. Andrews. (a) Those of Kilbride, and active Renfrew to the College of Glafgow. (b) And the Rectory of St. Machar to the King's Colledge of Aberdeen. As for the erected Baronies, f both many of these were made before the general Act of Annexation (which is the 29 of K. fames the fixth's II Parliament, and the first after his Majority, holden in the year 1587) whereby, for supporting the Royal Dignity, without Taxing the Subject, and to ingage uture Kings not to return to Popery, the Temporality of Benefices was Annex'd to the Crown, with a Provision that the same might

> (7) Il y eut des gens qui non seulement recurent le ses bien faits; mais qui furent avancez aux charges taux dignitez, ou pour avoir fait rotir a propos un ochon de lait, qui etoit son grand Ragout, ou pour voir place sa chaise ni trop loin du feu, ni trop pres: pu pour l'avoir le mieux diverti dans le jeu. Histoire Du schilme D' angleterre De Sanderus liv. 1. Sur la in. In this Age, Small Merits of Courtiers met with a prodiious Recompense for their Service. Not only all the Cooks, but be meanest Turn-broach in the Kings Kitchin did lick bis Finers, yea the King's Servants to the third and fourth Degree stead of his Liberality, &c. Fullers Church-Hift of Britan, Lib.6.

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⁽a) Parl. 12, 7. 6. Anno 1592. (b) Parl. 22. 7.64 mo 1607.

(118)

nevertheless be set in Feu; and the Ecclessafticks are declared free of Taxation and War. randice, except from their own Deeds, as to former Feus, Tacks, or other Rights granted by them of the Lands annexed. Preceeding Erections were Confirm'd, and some other Kirk-Lands left to the King's disposal; with a power to make from the Act, what Exceptions he pleas'd, betwixt and the Is August then next, several of which are therein subjoyned. All great and small Teinds not feued with the Stock perraining to any Parfonage or Viccarage, are excepted in the Act; and when Stock and Teinds are fet in Feu together, the entire Superiority, and nine parts of the whole Duties payable for Stock and Teind, is declared to belong to the King; and the Ecclesiastick or Titular to have the Tenth. All Parsons or Viccars Manses, with four Akers of Glebe nearest to the Church appointed for the Minister serving the Cure. All Lands, Teinds, and others disponed to Colledges, Schools, or Hospitals, or for fustaining of Ministers within Burghs, with all Rights of Laick Patronage, are particularly excepted: together with the Houses and yards of Prelats, and other Possessors of great Benefices, having then, or formerly vote in Parlia-The property of all Lands, and others disponed, or set in Tack, are secur'd to the persons having Right thereto, for payment of their respective Duties as formerly : only the Superiorities of thele, & of Burrows of Regality, & Baronie, Heritable Baillieries and Stuartries formerly,

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formerly held of the Church, are declared to belong to the King, and the Vaffals Heirs to be entered by Brieves out of the Chancellary: without necessity upon the Vasfals to renew their Rights from his Majefie. Neither can his Majestie quarrel the lame, being Confirm'd by him, or his Predeceffors, for by gone Contravention of any Claufe or Condition in their Inferences i nor for Diminution of the Rental, if it be not of the old Penny Mail, de liquido in liquidum; nor for Convertion of Vidual into Silver Duty, or any other Cause: Except for Falshood; or for not payment and performance in time coming, of the Duties and Services contained in their Infefrments. This is the Substance of the Act.

25. It may be alledg'd against this Act of Annexation; That the annexing of Popish Benefices to the Crown, or converting them to civil and profane uses, is a plain contravention of the Founders Will. But the A& may be thus accounted for, I. Most of these Mortifications were fraudulently elicited from persons impos'd on by ways and means of Priestcrast; and consequently aull. (0) 2. Tis the publick Interest, that none make bad use of their property. (b) And since neme savere potest ne Leges in suo Testamento babeant loum, (c) no Testament against Law or good manners is valid. (d) And therefore it is incumbent on the Orthodox Magistrat, as

⁽a) l: 53: ff: de Regul: Juris: l: 15: ff: de Jurisdistione.

b) S: ule: Institus: de his qui sui vel alieni juris. (c) la

5: ff: de Legat; 1, (d) l: 112: S: 3: ff: codem.

Gods

Gods Vicegerent, to convert to some honest and necessary use of the Republick, that which was left for an unlawful use. (a) So did the Princes and Cities of Germany at the Reformation; & defend. ed their practice by many Reasons extant at large in Sleidan. (b) But then one will fay, why were rhey annex'd to the Crown? The Reason given for this in the A&, is, because former Kings having impoverished themselves, by unjustly and unprofitably mortifying a great part of their Revenue to the Secular and Regular Clergy; the same should return to the From this it would feem confequential, that such Mortifications, as had been made by private persons, should have allo return'd to them. But besides, that it would have been hard to find out the true Heirs of these Founders and Benefactors, after so long a time: The Religious Houses being disfolv'd, the whole Revenue did by Law fall to the King, as Founder General of them all mediately or immediately, who confirmed or confented to, or at least connived at these Foundations. 2. These Benefices had been originally destinate to maintain an Idolatrous and Superstitious Worship, such as Massifying for the Living and the Dead, Offices to charm Souls out of the Popish Prison of Purgatory; Invocation of Saints, and the constant keeping up of Lights Night and Day for their Honour! Which doth appear from the Tenor of the

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Foundation Charters, that commonly bear pro Peccatis Eluendis, pro Anima, pro Redemptione Anima, in Remedium Anima Predece forum, pro Salute, pro Luminaribus Conservandis, &c. Now, that which belongs to a False Religion comes under confiscation. (a) 2. Que nullius sunt, ea (unt Domini Regis; and these were such: For the old Proprietars had no Right to them, after they were once disponed; nor the Religious Houses after their Extinction. Albeit, where a Mortification is made, or a Legacy left to one Incapable at the time by a person who did not know fo much, it should not fall to the King as caduciary, but remain with the Donor, or Testators Heirs, (b) since the property was never transferred. (c)

and Tiends into Lordships and Baronies were made after the general Annexation; but with the burden of competent provisions to Minissers within these Erections. Bishops Lands only were never erected; For that the King was resolved to re-establish Episcopacy: On the contrary, anno 1597, all Bishopricks were ordained to be disponed to actual Ministers and Preachers. (d) But then some Feus were set before the Annexation; some common Churches disponed by the King; and some Patronages with consent of the lawful Titular, and Ratified in Parliament; The Castle of S. And

⁽²⁾ l: 4: S: 1: & seqq: Cod: de Hæreticis & Manichæis.
(b) l: 3: pr: & S: 1: ff: de his quæ pro non scriptis habenture
li un: S: 2: & 3: C de Caduc: Tollend. (c) Mackenzie Observ: on the Ad 6: Parl: 1: Cb: 1, (d) Ad 231; Parl. 15: 7: 6.
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and the Lands of Lethem and Monimail, with the Patronage of the Church thereof, to Sir Robert Melvil of Mordicarnie: All which were specially excepted, secur'd and confirm'd in

the Act 1606 restoring Bishops.

27. B. Spotswood tells us, that his Majesty. upon fecond Thoughts, was forry for having pals'd the general Act of Annexation; and recommended to his Son the Rescinding thereof as a vile and pernicious one. All Rights of Laick Patronage were excepted from it: That is such Lay Patronages as were lawfully constitute before the Reformation; and not these the King had Right to as coming in place of the Pope, and which he disponed to Laicks; For the latter are still accounted as they were originally Ecclefiastick Patronages. Provostries and Prebendries of Collegiate Churches, Altarages and Chaplainries having been founded and doted by Nublemen and others for their own Ease, and Spiritual Advantage; they were thought to have more Interest than other Patrons in these Benefices, and therefore were allowed after the Retormation to dispose upon them for the Entertainment of Burlars in Colledges, without regard to the uses they were originally destinate to by the particular Foundations. (a) These being unlawful in a Protestant Countrey; and the liberal Education of Youth a matter of general concern,

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being at that time very much obstructed, and many a good Genius for Learning crush'd. through the poverty of Parents not able to maintain their Children at Schools or Colledges : It was judg'd the most ready Expedient for remedy of this Evil, to indulge Patrons of these kind of Benefices to present Burfars to them one after another; who might have Right to the whole Fruits and Profits thereof during their time. So that thefe Benefices were only supprest in so far as concerned the Popish Offices of Religion therein performed. Out of some Collegiate Churches Parsonages were erected. 'The Lord Chrichtoun, as Patron of the Parish Church of Chrichtoun, having, with confent of the Arch-Bishop of S. Andrews, to whom Lochqubarret belong'd as a Menfal Church, founded the Collegiate Church of Ebrichtoun out of the Rents of these Churches; referving to the Bishop the Patronage of the Prebends of Vogrie, Arnistoun, Middletoun, and two Clerks, that got their Benefices out of the Rents of the supprest Church of Lockqubarret. These Benefices were in the Year 1596 dissolv'd from the Colledge Church, and erected into the Parsonage of Bothwick by a Charter under the Great Seal. This Erection was ratified by the Parliament 1606; and declar'd to be valid, tho not proceeding upon dimission of the Prebendaries. and wanting the confent of the Lord Chrichtoun as Patron of the Collegiate Church: Relerving to the Prebendaries lettled before the Erection, the Rents of their Benefices during their

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their Lifetime. The Bilhop of S. Andrews did also ratifie the foresaid Erection in the Year 1609. Many Parish Churches were united to Bishopricks: As the Parsonage of Glasgow to the Bishoprick thereof; (a) the Church of Meigle to the Bishoprick of Dunkeld; and the Church of Kilmochormuck to the Bishoprick of

Argile. (b)

28. The provision of Ministers being mightily disappointed, and other Inconveniences happening by the numerous Erections of Church Lands and Tithes; The Parliament annulled all such as were made after the A& of Annexation 1587: Except parts of Church Lands already erected in favours of these who fince that time had been Nobilitate, and fitten in Parliament as Temporal Lords. (c) But in regard many others, for the more fecurity, had obtained Ratifications in Parliament of their posterior Erections; all such as were granted and ratified fince the Act of Annexation 1587, and not therein excepted, were rescinded and declared null by the 195. At. 14. Parl. Ja. 6. This was very disobliging to the Parties concerned and their Friends; and therefore to quiet their Minds, all Erections of Benefices not being of Cure belonging to Bishopricks were afterward ratified and confirmed: And the general Annexation Act rescinded, in so far as prejudicial to the Estate of Bishops. (d) But their Superiorities were

⁽a) Parl: 18: 3: 6: anno 1606. (b) Parl: 23: 3: 6: anno 1621. (c) Att 119: Parl: 12: 3a: 6. (d) Att 2: Parl: 18; 3a: 6.

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not expressly restored: Only there is a Clause in the 14. Ast. 1. Parl Ch. 1. That the Kings being Superior to Vassals of Erections shall be but prejudice to Bishops and their Chapters of their Rights of Superiorities. Nor did the Chapters recover their Temporalities till the Year 1617; and then the Priory of S. Andrews that had been formerly disponed to the Duke of Lennox, and the House of Hamiltoun, which the Marquis of Hamiltoun had got Right to,

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29. I now return to let see what came of the Thirds. They were dispos'd of by the Commission of Plat, till the Restauration of Bishops in the year 1606. who by the 2 AR 18. Parl: 7a: 6. were ordained to maintain their Ministers upon the Thirds according to the ordinary Affignations; And by the third Act of the same Parliament, to give up sufficient Rentals of their Benefices within a year to the Clerk Register, under the pain of 1000 Merks: That Ministers might be the more affured of their Stipends to be appointed forth thereof. Ministers payment out of the Thirds turn'd to very small account, for of two Valuations that were made, the one was so inconsiderable, and low, that their proportion came to just nothing; And the other in the year 1584, tho something more tolerable, was so hardly made effectual, through the opposition of persons interessed, that all the Ministers got by it was spent in pursuing payment. So that

⁽a) Aft 2. Parl: 22. 74: 6.

many chus'd rather to drop their pretentions! than to vex themselves in vain with a redione and expensive Process. This allowance out of the Thirds, was to continue till they were competently provided out of the Teinds. (a) But the Thirds happening to be extinguished. partly by the Restitution of Bishops, who got Right to their own Thirds; And partly by the Erection of Abbacies and Priories, Oc. into tempoal Lordships, in which the Thirds were discharg'd in Favours of the Lords of Erection. they planting the Churches: That Fond could no longer serve for a provision to Ministers. Therefore Commissions of Parliament were appointed to plant Churches, and modifie Stipends out of the Teinds: Which turn'd the Books of Assumption in desuctude; the they fill continue uleful for clearing the old Rentals of Benefices.

20 Having thus carried my Discourse concerning Ecclesiastical Revenues down this length; The History of Tithes would require to be more particularly considered: But that is reserved to the second part of this Book. I shall therefore now set my self to treat of the Temporality of Benefices. And the properest way that I can at present imagine of personning this, will be to explain, 1. How Titles to Benefices are acquired by Ecclesiasticks; And when they commence to take Essect. 2. What way they are extinguished, and when they cease to have essect. 3. To treat of Rights to

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⁽a) Act 10. Parl: 1. Ja: 6.

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Benefices that may be acquired from Beneficiaries.

4. Of Rights acquirable by Beneficiaries.

5. To confider beneficed perfons in the triple capacity of Subjects, Superiors, and Vaffals; And to shew what is due to, and by them, in these different respects. Of which I shall discourse in order as distinctly as I can.

CHAP. VI.

How Titles to Benefices are acquired by Ecclefiasticks; And when they commence to take Effect? Where also of Annats.

N Ecclesiastick doth acquire the Title to a Benefice by some certain Formality of Investiture from a person having Right to confer the same. Bishops were elected by the Chapter of the See they were defign'd for, upon a write from the King called A Conge d' Eslire, That is a power to elect, who yet were determin'd as to the person by his Majesties Recommendatory Letter. The Chapters Election being return'd, the King granted first a Patent to the person elected, carrying a Right to the Revenue, which pass'd through all the Seals: And then a Mandat to three Bishops at least for his Confectation, which pass'd only the Great Seal per faltum. (a) If a Bishop was

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^{(1) 48} z. Porl: 22, 70; 6.

translated from one Diocese to another, he needed not to be confecrated of new again; For Confectation is an indelible Character. that needs not to be renewed. (a) The For. mality of Admission to inferior Benefices of Cure is by Collation, and Institution, unless where the Bishop himself as Patron confers pleno jure; In which case Presentation and Collation are the same. Now when the Go. vernment of the Church is in the hands of Presbyters, the Act of Ordination and Admiffion by the Presbytrie serves for all. In Bene. fices that are not of Cure, fuch as Prebendaries or Chaplainries, Presentation was sufficient without the Ceremony of Collation or Inflitution.

a quite different nature from all other civil Rights. Since these are the Stronger, when given for an Onerous Cause, as an equivalent price; Whereas all contracts for gain in the disposing of the other, go under the odious character of Simoniack Pactions, and the parties are punished as guilty of Simony. For this Crime is more extensive than the sin of Simon Magus, from whom the name is borrowed. It was but rare during the first three Centuries of the Christian Church: The Temporal Advantages of the Clergy being then less tempting to ambitious Spirits. (b) But turned more frequent afterwards, as the condition of the

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⁽a) It Ibid. par Aquin: in Pr: S

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Church was bettered and exalted, with all the circumstances of Prosperity, Riches, and Grandure. But Thomassin (a) observes simoniacal Pactions to have been more common in the Western Church, and more authoriz'd in the East. The Apostolical Canons condemn as Simony the purchasing of Ecclesiastical Dige nities, whether by Money or Favour, or the influence of Secular Powers. (b) Peter Damian diffinguisheth three forts of Simony; One committed by the hand in making o' Presents. munus a manu; another by the Tongue in undelerved Praises and Flatteries, munus a lingua; A third by Officious Services, munus ab obsequio. (c) And 'tis a more heinous Fault with him to compass an Ecclesiastick Dignity by Services done to Princes and great Men, than by open traffick in Money. (d) Some of the Fathers look'd upon Simony as a Herely, if not the Sin against the Holy Ghost. (e)

3. The going to Rome, or making Applications to the Pope for getting Benefices in Scotland is interpreted Barratry with us; To be tryed before the Justices or Lords of Session, and punified by Banishment and Infamy. (f) And James Arc bishop of Glasgow was deprived after the Resonmation for going to Rome. (g) Bar-

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⁽a) Ibid: N. 1. (b) Can: 31. (c) Lib: 2. Epist: 1. Thomassin Ibid. part 4. liv: 3 chap; 12 N 1. (d) Ibid: N 2. (e) Th: Aquin: 20 2d. qu: 100 art: 1. sect 2. S. Augustin: de Hæres: in Pr: S. Greg: in Reg: hab: 1. q 1. &c. d. 1. (f Ja: 1. Parl: 7 cap: 107. junct: Ja: 6. Parl: 1. cap: 2. (g) Mackenait Crim; Part: 1. Tit: 5. § 4.

ratry is an Italian Word, implying a kind of Simony, by corrupting of Ecclesiastick Judges.

4. The punishment of Simoniacal Pactions is deprivation and deposition. (a) And it made by the Intrant with the Patron, so as the Minister is cut off from a sufficient maintenance, answerable to the Value of the Benefice, the presentation may be refus'd; And the Lords of Session are to Judge in this matter. (b) And to determine what this Competency is. (c) Sir George Mackenzie concludes, that whatever is punished as Simony by the Canon Law, is punishable with us, and probable by Oath, because of the Clandestine Nature of this Crime. (d)

5. Some pretend to palliat their Simony by alledging that they do no more than purchase with Money the Temporality of the Benefice: Whom Damian doth with a great deal of Zeal Others, to justify their Simony, object, that Saul, when he went to confult Samuel concerning his Father's Affes, and the Wife of Feroboam, when the went to Abijab, to know what would become of her Son; Took Prefents with them: To which Difficulties St. 3" rom answers, That the Israelites who frequent ly consulted Diviners and Sooth-sayers, might have laboured under a mistaken apprehension, that the Prophets of the true GOD were no more accessible without Presents, than the Devils. Farther, 'tis not said that Samuel 18-

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⁽a) C. sicut Simoniaca 6 Extr: de Simonia (b) Ja: 6. Parl 21, cap: 1. (c) Mackenzie, Ibid; §. 3, (d) Ibid.

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ceived any thing from Saul, but on the contrary he lodg'd and intertain'd him. And the Prophet Abijab was so far from accepting the Queen's Present, that he sent her away with a severe Reprimand, and the mortifying predition of the death of her Son.

fry to find Instances of Simony, which have sometimes been covered with very thin pretences. Witness, That Richman, who to elude the Canons, wager'd a great Sum of Money with King James the Fifth, that he should not be prefer'd to the first vacant Benefice; And thereby got himself made Abbot of Holy-roods

bouse, and then Bishop of Ross.

7. All Benefices should be vacant before they are filled: (a) That there may be no Votum captandæ mortis alienæ; and the Provision should mention modum vacandi. (b) But the Pope took upon him to confer Beneficia vacatura explenitudine potestatis. To annul which Provisions, the Act 86. Parl: 11. Ja. 2. was made. A Gift of a Benefice in thir Terms, when the same shall happen to vake, is ipso jure null. (c) And a Presentation being made to one, and to another after his decease; The Substitution was found illegal and unwarrantable. (d) Aliebeit a Presentation to two persons conjunctly,

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⁽²⁾ Tot: tit: de concess: prabend: & Eccles: nondum vae: F. de Roye, ad tit: de jure Patron: Prolegom; cap: 23. Bengaus de Benefis: ad verb: concessa cap: 1. Pr. N. 3. (b) Arg. C. Presysteri dist: 24. Mackenzie Observ: on the Act 1. Parl: 22. Ja: 6. (c) Hope Maj: Prat: (d) 24 January 1677. Stuart control Nairn.

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the twenty eighty Rule of the Roman Chancellary, Tantum temporis post vacationem beneficit effluere debet quantum sufficit illam ad notitiam summi pontificis pervenire. Which Rule the Lords sustained for the Reason of it, without regard to the Lawgiver. And therefore Mr. William Melvil Commendator of Tungland, his Provision to the Abbacy of Kilwinning, upon the death of the Commendator thereof, was found null: For that his Predecessor died at Five a Clock in the Asternoon of that day on which the Gist was dated; So that it was not probable the King could know so soon of the Vacancy (a)

8. The first Years Rent of Benefices called Annats, us'd heretofore to be applyed to pious and publick Uses; but at length were claim'd by the Pope as his property. Some fay John 22, others that Boniface 9. was the first who pretended to annex them as a fix'd Cafuality to the See of Rome: But Polydore Virgil (b) runs their Original much higher. Annats were condemn'd and abolished by the Council of Bafil, and the Pragmatick Sanction; but in a manner restored by the Concordat. could not be exacted in Scotland without the Kings confent, who got the fifth Penny; and somerimes the Parliament dispos'd of 'em. (c) For even in the time of Popery, the absolute Authority of the Roman See was much limited by our Parliaments in matters

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⁽a) Spotswood Pratt: Title Kirk-Men and Kirk-Patrimens.
(b) De Invent. Rerum, Lib; 8; Cap: 3. (c) Act 4: Parl: 3: Mary.

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touching upon the Regale. The first Fruits and fifth Penny of Benefices were allotted in the Year 1584 for establishing a Horse Guard to the King, (a) which is now paid our of the Excise. But Ministers provided to Benefices under Prelacies were thereafter declared free from Payment of these first Fruits, and fifth Penny: (b) And 'tis now long fince any fuch Exaction was in Scotland. In England the Sovereigns pretence to the first Fruits was always kept up from the 26. Year of King Henry the Eight's Reign: Till of late, that Queen Anne, out of her Princely Compassion upon the mean condition of the inferior and poorer fort of her English Clergy, was gracioully pleas'd to pass from it in their favours.

9. Annats with us being out of Doors, a benefic'd person has Right to the whole Years Rent, if he enter before Whitfunday; and to no part of it, if he be transported or depos'd. But he gets the half Year, if his Entry, or Transportation, or Deposition be after Whit-Sunday, before Michaelmais; and the whole, if he be transported or depos'd after Michaelmass. (c) But a transported Minister was found to have no Right to a Terms Stipend before his Collation, though after his Presentation, ale beit he preach'd once before that Term: Having got the Stipend of the Church he was transported from. (d)

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⁽a) Att 137: Parl: 8: 7: 6. (b) Att 26: Parl: 11: 7: 6. (c) Stair Instit: Lib: 2: Tit: 8: 9: 33: July 24: 1662: Weyms contra Cunninghame (d) December 12: 1676. Golleage of Glasgow contra Heretors of Jedburgh Parish.

CHAP. VII.

What way Titles to Benefices are extinguished; and when they cease to have Effect?

HE Canon Law doth make Benefices to vake many ways: But chiefly by the Incumbents Deceafe; (a) or Deprivation; or Refignation; (b) or by his being provided to two incomparible Benefices, whereof the first becomes void upon his attaining posfession of the second. (c) The legal grounds of Deprivation with us are fet down in the 122. and 122. Acts, Parl. 8, Acts 28. and 32, Rarl. 11. 7.6. As to Refignations, some were made referving to the Refigner the Fruits of the Benefice by way of Pension. Which method was condemned by the Canon Law; and yet the Popish Prelates at the Reformation finding themselves going to be turn'd out, did demit their Benefices referving their own Liferents. Whereby the Benefices came to be neglected, fince they who should have ferv'd the Cure had nothing for their Pains, correct this abuse, all such Contracts were annulled by Authority of Parliament. And it was declared, that no provision thereafter to any I cease be v suspending contractions

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⁽²⁾ Bengaus de Benefic: ad Verb: Concessa: C: 1: §: 8: N: 2: E: de Roye ad Tit: de Jure Patron: Prolegom: Gap: 23. (b) Ibid: Bengaus, Ibid: §: 9: N: 1. &c. (c) Ibid: §: 3. N: 2: Hope Maj: Prett.

any Prelacy not vacant by the possessors Decease, Forfeiture, or simple Dimission, should be valid. (a) The Stipend of a Minister suspended doth not vake: The Suspension being only interpret to be ab Officio, non Benefit

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2. The time was, when the Goods of the inferior Clergy did at their Death fall as Caduciary to the Bishop; and in like manner they did meddle with his, when he came to die. Covare ruvias(c)doth infinuate, that the Bishops of Spain must have the Royal Assent, before they can dispose in Testament of their Ecclesiastical Revenues; or dying Untestate can be suc. ceeded therein by their lawful Heirs. And it was long a custom even in Scotland, that the King fucceeded as Executor to Bishops: Which William Landel Bishop of S. Andrews got discharg'd by King David Bruce; with liberty granted to Prelates freely to dispose of their Goods by Testament, and to their nearest of Kin to succeed them ab Intestato. The benefit of which priviledge he himself first enjoyed. Now by our Law Prelates, that is, all bene-Moveable. (d) Tho the Act of Parliament (e) be only express as to Barons, Gentlemen and Freeholders.

3. Benefic'd persons have not only a Right to the profits of the Benefice during their In-

⁽²⁾ Ast 1. Parl: 9: J: 6. (b) July 26: 1661: Ker centra Parish of Cariden. (c) In Cap: cum in Officiis de Tefem: N: 9. (d) Stair Instit: Lib: 3: Tit: 5: §: 9: Mackenzie Observ: on the 54: Ast, 7: Parl: J: 3: November 28: 1623: Rig contra Mackenzie. (c) d; Ast 54.

cumbency, and a power of Administration, or doing Deeds effectual after their Death, or remove: But also when they are gone, their Wives, Bairns, or nearest of Kin, get a portion called the Ann Which, from the Example of the Paxon Reformed Church, King Fames 6. introduc'd here by a Letter to the General Assembly ratified by them. This Ann is now determined to be half a Years Stipend or Rent of the Benefice, over and above what was due to the Defunct. That is, if he furvive Whit funday the one half of that Year is due for his Incumbency, and the other as Ann: And if he die after Mi baelmals, the half of the next Year goes for the Ann. (a) But yet a Minister having ferv'd the Cure till Wbitfunday, was found to have no Right to that half Years Stipend; in regard he did not take the Test before the fift of Fanuary 1682, as all in publick Office were appointed to do: (b) Albeit had he died before January 1682, his Representatives would have had Right thereto as Ann. The Ann is equally divided betwixt the Relict and the Children; or failing these, betwixt her and the nearest of Kin. (c) If there be neither Wife nor Chi dren, it belongs to the nearest of Kin, (d) and extends to the Rent of the Glebe, if there be no new Intrant,

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⁽a) Att 13 Parl. 2 Seff 3. Ch. 2. (b) February 1685: Hume contra Galbraith (c) Stair Instit. Lib. 2. Tit. 8. 9. 34. Mackenzie Observ. on the 4 Act, 3. Parl & Mary. (d) July 6. 1665 Colvil contra Lord Balmerinoch. June 24. 1663. Scrimzeour contra Executors of Murray.

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(a) otherwise not. For if there be an Intrant, both Manse and Glebe belong to him; and neither of 'em fall under the Ann: unleis the Glebe was fown by the Defunct and the Cropt upon the Ground t the Intrants Entry. (b) An Ann will be due, not only upon the Death of Bishops and Ministers : but of any other beneficed person; tho not upon a voluntar Renunciation of the Benefice. (c) It needs no confirmation. (d) Neither can it be disponed to Strangers by the Defunct; nor affected by his Creditors. For it never belong'd to him, but is only a Gratuity the Law indulgeth upon the account that Clergy-men are not suppos'd to die rich. (e) Yet a penfion granted by a Bishop was not only found due during his Life, but after his Death out of the Ann. (f) A Bishops Ann comprehended only a Right to the Quotes of Testaments adually confirm'd in his Lifetime, or during the currency of the Ann. (g) Altho a Composition paid by an Appryser, or the double Feu Duty by an Heir for their Entry, would not fail under the Ann, but belong to the Incumbent; For only the Bishop himself could enter Vaffals; whereas Testaments are confirmed by the Commissions without the Bishop. And the Quote is due for the Confirmation.

⁽a) July 19. 1664. Inter cosdem Scair, Ibid. (b) July 6. 1665. Colvil contra Lord Balmerinoch. (c) Mackenzie, Ibid. (d) July 26 Ker contra Parishioners of Cariden. (e) Mackenzie Instit Lib. 1 Tit. 5 (t) February 28 1628. Bairns of the Bishop of Galloway contra Comper. (g) July 6. 1676. The Bishop of Edinburgh contra Wishart.

CHAP. VIII.

Concerning Rights to Benefices that may be acquired from Beneficiaries.

Y the Canon and Civil Laws, the Patrimony of the Church is not alienable. (a) Except, 1. For payment of the necessary Debts of the Church contracted for upholding the Fabrick, and for the Defence of the Christian Religion against the Insults and Machinations of Hereticks or Infidels. 2. For a pious Caule, as to maintain the starving poor, or to Ranfom Christian Captives from Insidels. 3. For the greater Good of the Church; as where the Lands are not otherwise so improvable. (b) And because Ecclesiasticks finding themfelves but Administrators or naked Liferenters, might have possibly been tempted and prevailed upon, by the Influence of Friends and Kinsmen, to dilapidate their Benefices, to the prejudice of Successors; their management and power of disposing was, by the Canon Law, put under the Check of some Limitati ons. For no Prelate, whether Regular or Secular, could do any thing material, without consent of his Convent or Chapter, and also of the ferior Patro as faic of til perfor 2. . nefice ed to Signa case a expre fices, Dimi under Nulli that i (d) did n Rent at ve wher into] bited the t ed : rising tione

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⁽a) C. Sine Exceptione, 52. Caus. 12. Qu. 2. C. nulli licest 5. Extr. de Reb. Eccles. non alien, l. 14. C. de SS. Ecclesis. (b) Gloss: in Caus. 12. Qu. 2.

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of the Patron, if there was one; (a) nor inferior Beneficiary, without consent of his Patron. And even Deeds done with confent as faid is, were lyable to certain Restrictions of time, and an Onerous Cause; and to be

performed with folenin Formalities.

2. All Ecclesiastical persons entring to Benefices at the Kings Presentation, were ordained to find Caution, before expeding of the Signature, to leave the Benefices in as good case as they found them. (b) Ministers are expressy discharg'd to dilapidate their Benefices, by fetting them in Feu or Tack, with Diminution of the Rental paid at their Entry. under the pain of Deprivation; besides the Nullity of the Right. (c) And Rights of that nature granted by Prelates are also null. (d) To elude which, the benefic'd person did not give down of the Number of the Rental Bolls, but converted them to Money at very inconfiderable prices. For obviating whereof, such Conversions of Victual Rent into Money below the true value was prohibited. (e) But the price that the Bolls gave the time of the Conversion is only considered: Since both Parties took the hazard of the rising and falling thereof. And the Sum mentioned in the Conversion is presumed to be the true value, unless it can be proven, that the Victual then fold at higher prices. (f) The dilmembring any part of a Benefice

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⁽¹⁾ Craig Feudor, Lib. 1. Dieg. 1. (b) Alt 11. Parl. 10. 3.6. (c) Att 101. Parl. 7 9.6. (d) Att 11. Parl. 10. 3.6. (e) Ibidem. (f) Mackenzie Observ. on the 11. Act 10. Parl. 7, 6.

is declared a Dilapidation. (a) But fince all that Law requires of a Beneficiary is, that he do not prejudge his Successors, by leaving the Benefice under a less Rental and Value than he found at his Entry: His granting of Rights according to the Original Rental, or Feu Duty at his Admission to the Benefice, will not be constructed a Diminusion; tho the same has been improven & augmented during his own Incumbency. So it was found no Dilapidation in a Bishop, to pal, from Certification obtained by him in an Improbation against his Vallais, and to give a new Charter for the old Feu Ducy. (b) S. G. Mackenzie is of Opini. o., (c) that such a new Right ought to be fullained, tho made by the Succellor of him who obtained the Certification; and that, for the fame Reason, Rights flowing from benefied persons after Reduction obtained by them ob non folutum Canonem, are good and unquarrellable. But it wou'd feem, that Bishops could neither ditapidate their Benefices directly, nor yet indirectly, by omitting lawful Defences in a Process; and that therefore Come petent and Omitted was not relevant against their Successors.

3. No Ecclesiastick should grant any Right to his Benefice, till once he is compleatly invested in his Office. And by the st Att, 22. Perl. 7. 6. A Bishop had no Right to the

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Tepmorality, till after his Confectation. Yet it would feem that Bishops elect. and Bishops postulat us'd to dispone or set long Tacks of their Kirk-Lands; since they are Discharg'd to do so by the 77. Act, 9. Parl. Queen Mary. And Bishops elect, Exercent ea que sunt jurisdictionis; sed non ea que sunt Ordinis. (a)

4 Because the Popish Clergy at the Reformation were put from their Benefices; They were declar'd free of Warrandice, except from their own Deeds, or Rights granted by them, of, or concerning their Temporalines. annexed to the Crown by the General Annexation 1587, (b) which was done only in majorem cautelam. For by the common Law they could not have been reached for eviction proceeding upon a supervenient Statute, (c) And nothing can infer Eviction or Recourse, but what had a Cause anterior to the Warrandice. The Lois or Gain by all casual Superveniencies being the Purchasers; unless where the Contrary is exprest. Church men should warrand all Rights made for one ous Causes by chemselves, or their Predecessors in Office to him who is in possession by vertue thereof. The Bishop and Chapter are conjunctly lyable to warrand Deeds done by him with their confent: But the Bishop alone, without the Chapter is not. Nor is a Patron bound to warrand Rights granted by the

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⁽a) Greg Tholof. Syntag. jur. Part 2. lib. 15. cap. 12. N. 23. Mackenzie Observ. on the 77. Act. (1) Act 29. and 110. Parl. 11. J. 6. (c) Mackenzie on the said 29. Act.

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Beneficed person with his Consent. Church Lands being disponed with absolute Warran. dice, the Disponer was found oblidged to Warrand from an after designation of a Glebe; tho it was alledg'd that the fame was evided ex natura rei, and not ex defectu juris. But no Recourse was allowed against him upon a Designation for Horse and Cows Grass to the Minister, conform to the 21 Act, 2d Sess. of King Charles the 2ds first Parliament. (a) The Reason of the Disparity was, because the Att 21 was a Supervenient Law, and de clared to be Effectual from the year 1649, only as to Manfes, and not as to Horse of Kines Grass. But then fince the Retrospect is not expresly in favours of Glebes, it would feem that they also should have been determin'd by the common Law.

5. Rights of Benefices acquired from Beneficiaries are either absolute, and perpetual, or temporary. The Latter is constitute by Tacks or Pensions; The other by Disposition or Adjudication; and both by Possession.

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(a) Dirleton Deoif. 15. July 1667.

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SECTION I.

Of Dispositions and Feus granted by Ecclesion asticks of the Temporality of their Benefices.

Disposition of Church-Lands is a voluntary Alienation thereof, to be holden of the Disponer, or of his Superior, either Feu, or Ward, or Blench, and containing ordinarly a Precept for Infeftment. both the ways of A me, and De me: The one base, and the other publick. But a publick Infefrment in Lands to be holden of the Difponers Superior, is null until it be Confirm'd by the Superior. (a) Nor will a base Infest. ment without Confirmation exclude Recognition, or the casualities of Ward, Non-entry and Liferent Escheat, falling to the Superior by the Disponer's Death and Rebellion. And in a Competition upon leveral Confirmations, the last Right first Confirm'd will be prefer'd.

2. All Feus of Church-Lands before the year 1558 (when the Reformation began) not Confirm'd, either by the King or the Pope, are declared null. (b) Not as if the Popes Confirmation had been ever necessary by any positive Law with us. He us'd indeed

⁽a) Act 66. Parl, 5. J. 6. (b) Act 7: Parl, 9. J. 6.

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to Confirm Rights made of Church Lands: But that was a Priviledge he had usurped, as pretending to theuniverfal Superiority & Patron. age of all Benefices; and to the fole Right of be flowing them contrary to their own Canon Law. (a) For Feus of Church-lands prior to the Reformation, were and are valid with. out any fuch Confirmation. The Act 7. Parl 9. 7. 6. being only made to obviate the Di lapidation of Benefices, which was frequent about the time of the Abolishing of Popery, It wou'd appear from the Narrative of the 190 Att, 13. Parl. J. 6. That we had no antient Statute or Constitution, requiring either King or Popes Confirmation to Ecclefiaftick Fens: But the necessity of the King's Confirmation is clear from R. Majestatem, Lib. 2. Cap. 22. for fuch Lands are de Eleemolyna Regis, and prefumed to have been given by our Kings for praying for them, and therefore should not be inverted to another use without their consent. Which Priviledge the Pope in his arbitrary manner, did afterward assume to himfelf.

3. By an At of Secret Council, September 10. 1561, and the 2. At, Parl. 1. J. 6. The seeking Confirmations from Rome, was Discharg'd under the pain of Barratry. And in Queen Maries tenth Parliament 1564, the Queens Confirmation of Infestments given fince the 8 of March 1558, is declared Equivalent to the Popes in former times; and his

⁽a) C, non licest Papa 12. qu. 2.

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Confirmations after that year, are declared invalid. By the 7. A8, 9. Parl. 7. 6. all Feus of Church lands, not confirm'd by the King. are null by way of Exception. But this Att was afterwards restricted and qualifyed by the 187. Act, Parl. 13. 7. 6. which allows no fuch Feu-Infestment granted by Prelats of old. and Authoriz'd by the consent of King James the fifth, or any of his Predecessors under the Privy Seal, to be quarrelled for want of Confirmation. Tho the Acts of Parliament be only express as to the Confirmation of Feus; Long Tacks for three Nineteen years (as Balfour in his Pratticks observes) are esteem'd Alienations, and should be confirm'd. Yet in regard the Acts only require the Confirmation of Church-Lands, The Lords inclined to think, that Feus of Salmond Fishing needed no Confirmation. (a) And found an Infeftment in an Office of Forrestry, whether holden Feu, or Ward, with a Duty out of the whole Lands of an Abbacy, to be valid with out Confirmation. (b) Nor was the Circumstance that the Duties of the Office affected the Lands, thought material. Seing a Constitution of Thirlage upon the Lands of the Abbey, to a forreign Miln for a Thirled Duty, would not have been Null for want of Confirmation. And yet at this Rate, the Abbot might have eluded the Law, and exhausted the Benefice. I find it not decided, whe-

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⁽a) Mackenzies Observ. on Act 7. Parl. 9. J. 6. (b) January 20. 1666, Lord Rentoun contra Feuers of Coldinghame.

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ther Infeftments of Church-Lands holden Ward need Confirmation or not; Nor shall I interpose my Judgement in the point : But Sir Robert Spotswood fays, (a) That Confirmation of Kirk-Lands is only mean'd of Fen. The Charter of Confirmation was not probative, except the confirm'd Charter was produc'd: and if the Confirmation was granted by the Popes Legate, or any Commissioner; the Commission behov'd also to (b) Process was suffained be produc'd. in a Removing from Church-Lands, upon a Seafin confirm'd after the Warning, but before the Summonds. (c) Whether a Law requiring Confirmation to Feus of Ecclesiastick Benefices, was absolutely necessary before or fince the Reformation, or not: There was good reason for it about the time of the Reformation, when the Popish Clergy forefeeing clearly that their own Interest in these Benefices could not last or stand long, did prodigally Feu them out to their Friends.

4. No Prelate could Feu out any part of his benefice without confent of the Chapter or Convent; at least of the most part of the Members
beside the Setter, (d) Whereof such as had two
Benefices had two Votes. (e) But persons subscribing as Members of the Chapter, are presum'd in Law to be Members, and also the

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⁽a) Frat. Title, Confirmation of Kirk-lands. (b) Ibid. (c) Ibid. (d) Craig Fend. Lib. 1. Dieg. 11. Start Instit. Ib. 2. tit. 8. S: 17. (e) Craig ibid. Mackenuit Observ. on the 2 Act, 22, Parl. J. 6,

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⁽a) Si

E) Lib.

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Majority, unless the contrary is proven: And this Majority is to be calculated without refpect to Minors, or Absents out of the Countrey. (a) And if there be no Chapter or Convent, the Prelats Deed is sufficiently formal, having the common Seal of the Convent appended with the King's Confirmation. (b) For of old the Appending of the common Seal did serve for the Chapters consent, that being never done but at a folemn Meeting when the Members were capitulariter congregati, all present, and the plurality consenting. But at length to obviat Fraud and Forgery, to which Deeds only Seal'd were obnoxious; Subscribing was enjoyned by Act of Parliament. (c) Yet it continued the peculiar Priviledge of the Arch-bishop and Chapter of St. Andrews, that their Seal did supply their Subscription. (d) The Canon Law requied a Chapterly Convention to the Authorizing f a Prelats Deed; as if emendicata suffragia, separatim impetrata, did not import a Conent. But this is not only tacitely dispens'd vith by our Custom, as Craig (e) observes: ut even by an express Statute. (f) Nay. rther; an Instrument of Resignation of a art of a Benefice was sustained, tho of a date offerior to some of the Subscriptions in the rocuratorie. (g) But no Subscription by any so the

2) Nov. 16. 1624. Hope contra Minister of Cratghall.

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b) Ibid.

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⁽a) Stair ibid. Mackenzie ibid. (b) Craig ibid. (c) aig ibid. (d) Act 3. Parl. 18. Act 8. Parl. 19.]. 6. Lib. 1. Feud. Dieg. 11. (f) Act 3. Parl. 18. J. 6.

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of these Consenters will avail, if obtained at ter the death or deprivation of the principal Granter of the Right, or of any of the other Subscribers. For they cannot be faid to con fent who are not alive, and in Office together at the time, and where many fubscribe fepa rately as Confenters, the last confent is drawn back to the first. (a) And therefore if a Prelate having granted a Right in Favours of one without the Majority of his Chapter Subscrib ing, shall change his mind, and dispone the same thing again to another with a full Chapterly confent; The fecond Right will be pro ferred: Altho the first came afterward to be perfected by the due complement of Subscrip tions. (b) Rights granted by beneficed perfons in manner forefaid, were fufficiently valid even in time of Popery, without the Poper confirmation: Albeit many persons for farther fecurity took Confirmations.

5. The Generality of Feudalists are of Opi nion, that the these Cautions and Solemnitis must be observed in the first Alienation of Benefice, yet that if the same shall afterward return to the Church, through the Vassals De linquency, or otherways; it may be fewed ver again by the Prelate without confultinghi Chapter. But Craig (c) is clear, that accord ding to our Custom, the consent of the Chap ter is requifite, Tam in renovatione quam in all

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⁽²⁾ Graig Ibid: Mackenzie Obse: v: on the Att 2. Parl: Ju: 6. (b) Craig Ibid. (c) Ibid,

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6. A Chapterly consent was not only an inhispensable Formality in the Deeds of Prelates; but also necessary to Legittimate and Strengthen the Deeds of the Subaltern Members of the Chapter. (a) And as nothing could be done by the Prelate without consent of his Chapter, or most part thereof: So neither could the particulars Members of the Chapter do any thing in their private Benefices without consent of him, and the Plurality of the Chapter: Except the Members of the Chapter of the Archbishop of St. Andrews. (b)

7. It is an ordinary Question, whether sede vacante, while there is no Prelate, the Chapter or Convent might do what he could have done with their consent? And the Answer is, That during the Interval of a vacant Prelacy, the Right of Administration in Spirituals is indeed lodg'd in the Chapter, as to Benefices pertaining to them and the Prelate in common; but not where they belong'd to him alone; (c) Such as Menfal or Patrimonial Churches. Neither can the Chapter receive Refignations; that being the Prelates Prerogative. But they may conferr Benefices fallen to the Bishop jure devoluto, since that happens ratione jurisdictionis; and may also give Collation upon the Patron's presentation; and in all other cases, where the Bishop himself might be compelled to do it: (d) For the Dean of the Chapter, while the See is vacant, is the

Bishops

⁽a) Stair Inst. it: lib: 2, tit: 8. S. 17. (b) Mackenzie Ibid: (c) Craig Ibid. (d) Hope Maj: prat.

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Bishops Vicar General, and has the same power he had in spiritualibus, and in matters que funt necessariæ jurisdictionis. As to the disposing of the Temporality bygranting voluntary Rights, the Deed of the Chapter is not sufficient: For the Fruits and Profits sede vacante fall to the King. or to the proper Patron. (a) Therefore a Fen granted by the Vicar General, with confent of most part of the Chapter, while there was no Bishop, was reduc'd: As being a voluntary Deed, that requir'd to be Authoriz'd by the Prelate himself. (b) Nor would the Lords fustain the Queens Confirmation obtained after intenting of the Reduction, to supply the want of the Bishops consent, the same being only general, and in common Form, without mention of supplying of the foresaid Defect. (c)

8. As Prelats with consent of their Chapters or Convents are Impower'd to grant Feus of their Benefices; The like may be done by Inferior Ecclesiasticks, such as Parsons, Vicars, and others, with consent of their Patrons. (d) And the I recken'd Provests among Prelates, (e) it must be considered that they are so far of an inferior Order, That Deeds done by them require the Patrons consent, if there be one, as well as the Chapters. (f) But yet Patrons may gift away Prebends without the concurrence of the Provest, or Canons; unless

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⁽²⁾ Craig Ibid: (b) Spotswoods Pratt: tit: Kirkmen and Kirkpatrimonie: (c) Ibid. (d) Craig Ibid. (e) Supr. chap: 5. N. 3. (f) Stair Instit: lib: 2. tit: 8. \$, 19.

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g. It is much questioned, if any Ecclesiastick without his proper Consenters, may better and improve the Condition of his Benefice? Some think such a Feudal Contract would be ipso jure null, as if it had been done by a Minor having Curators, without their consent; Others alledge the contrary, and that as a Minor may without consent of his Curators make his condition better, and contract profitably, so may a Church-man without consent of his Chapter or Patron. I shall not be positive in the Matter, because the Learned Graig is a non-liquet, tho he seems to incline most to the latter Opinion. (b)

fignation, periculo petentis, who gets no farther Right than the Refigner had. But an Infeftment of Kirk-lands by vertue of a Charter subferived by an Abbot, with consent of his Convent, proceeding upon Resignation without a a special Reddendo, and only relative to the former Insestment, was sustained. (c) For the King and Kirkmen are in a different case; and things pass not His Majesties hand ex certa sci-

entia.

Ward-lands, when they were barren, to a competent avail; That is, for the retoured Duty at least, Act 9. Parl: 23. fa; 6. But this

⁽a) Mackenzie Observ: on the 12. Act 1. Parl: Ja: 6. (b)
Caig Ibid.)c) January-17. 1666. Lord Rentoun contra the
Finance of Goldingham.
Statute

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Statute was Temporary; For under the last Establishment, Bishops could neither Feu not Tax their Ward-lands. Both these being look, ed upon as Deeds of Dilapidation.

SECT. II.

Of Tacks granted by Ecclesiasticks of the Temporality of their Benefices.

A TACK is a Contract of Location, whereby one grants a Right to the Use or Profits of any thing during a determined time to another; For payment of a certain Hire, called, The Tack-duty. We term the Granter of the Tack the Setter, and

the Receiver the Tack/man.

clesiasticks to Secular Persons, was once a rare thing: For when the Clergy lived in community, they cultivated their Lands with their own Hands. (a) But at length Tacks by Clergy men of the Rents of their Benefices turn'd so frequent, and withal so pernicious to the State of the Church; That Laws were made for regulating and retricting that practice. Which required to the Validity of these Tacks, that they be not set with diminution of the Rental, (pay'd at the Setter's Entry) whether for fewer Bolls, or at an undervalued price; That

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⁽a) Bengæus de Beneficiis ad verb: cum suo Reditu cap. 3. §. 13. N. 1.

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the Major part at least of the Chapter, or Conventual Brethren consent, if the Deed is granted by a Prelate; and if by an inferior beneficed person, that the Patrons consent be interposed; and the other circumstantial Solemnities observed as in the case of Feus. cause it might have been pretended, That however Beneficiaries were tied up from lessening the fix'd and constant Rent of their Benefices by Tacks, to run after their time; yet the Casualities of the Benefice fell not under the Prohibition. By the 5. Act 22. Parl: Ja: 6. Tacks fer thereafter by Bishops of their Ouors of Testaments, and other Casualities, are null, and no longer effectual than during the Setters Lifetime. A Bishop cannot set a new Tack before the old one is expired, more than a Right to the Benefice can be conveyed while its fall. For the beneficed person, so long as the Tack stands, has only Right to the Tackduty. (a) Sir John Nisbet (b) states the Question, Whether Bishops finding standing Tacks of their benefice at their Entry, may fet new Tacks after expiring thereof: The benefit being the same by the New Tacks as by the former? But Sir James Stuart (c) thinks the case is not the fame, and that they might by the like Reason' prorogate the old Tacks: But the Act of Parliament regulates this Matter. Sir John (d) likewise moves this doubt, If a Bishop

upon

Series 1

⁽a) 20 March 1683. Bishop of the Isles contra the Tacksmen of the Tithes of that See (b) Doubts in the Law Title Dilapidation. (c) Notes upon the Doubts. (d) Ibidem Title Bishops.

upon the point to be translated, may accepta Renunciation of a Tack not expired, and grant a new Tack for more years, in prejudice of his Successor ? As to which this is certain. That he could do nothing in fraudem of his Successor. And the it was an ordinary thing with a Bishop to set Tacks, after he knew himself recommended to another See ; it was down right Fraud, and should not be allowed. Otherwise the Intrant Bishop could not expect, but to find all his Patrimony exhausted by such Tacks. A Bishop having for. merly confented to a Tack, when himself was a Member of the Chapter; cannot quarrel the same after his Promotion, for Diminus tion of the Rental, or Conversion of Bolls into Money, or upon any fuch like Account. For the Chapter being quafi Tutor, every Member is bound, at the giving of his confent to Deeds, to enquire if the same be for the Advantage of the Church; and fo cannot be allowed. when he comes to be a Bishop, to call in queftion what he once, in the inferior Capacity of a private Canon, acknowledged to be fit. (a)

3. To check and restrict the boundless liberty taken in setting of Tacks for many Liferents and nineteen Years; by the 4. Act, 22. Parl, J. 6. Bishops and other Prelates are discharged to set longer than 19. Years, and inferior beneficed persons for longer space than their own Lifetime, and sive Years thereafter,

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⁽a) Mackenzie Observ: on the Act 4: Parl: 22: 7:6.

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(except by Order of the Commission) under the pain of Deprivation. And farther, the Contraveeners are declared Infamous, and Incapable of any publick Church Office. Longer Tacks were ordained to be Registrate within 40. days in a particular Book to be kept by the Clerk Register for that effect; otherwise But then a Tack fet by one of the inferior Clergy for longer space than this Act allows, was not declar'd null; but only the punishment of the Statute incurr'd by the Contraveener: and Registration thereof in the Books of Council and Seffion Suffained as sufficient, in regard the Clerk Register had not made a particular Record for that effect, in the Terms of the Act. (a) Tutors, Curators, Factors or other Administrators of other Mens Affairs, cannot fet Tacks for a longer time than their Office continues. (b) But here we fee, that Church Men may; tho thefe are even but naked Administrators. As Prelates are bound up by the foresaid Act from granting Tacks of a longer Endurance than 19 Years: So neither can he fet for that space. without consent of their Chapter or Convent. at least of the plurality of the Members, besides the Setter. And when we say, that the inferior Clergy can fet Tacks to run five Years after their Decease: That is always to be understood with consent of the Patron, whether Laick or Ecclefiastick; (c) obtained ei-

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⁽a) November 9: 1624: Hope contra the Minister of Graighall. (b) Graig: Feud: Lib: 2: Dieg: 10: Stair Instit: Lib: 2: Tit: 9: §: 3. (c) Ast 15: Parl: 23: J: 6.

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ther before or after the fetting of the Tacks. (a) For without that, they can fet but three Years Tacks. (b) The Reason is, bei cause it was thought the Patrons Interest, to fee to the right Administration of the Benefice: that, upon the Incumbents Death, he might the better find an able Man to supply the And by the Canon Law, the Admistration belongs to the Patron; he is to be alimented, if he fall poor, out of the Rens of the Benefice, and takes an Oath of the perfon presented to preserve and not dilapidate the Temporality thereof. Besides, it were hard so far to flight a Patron, as not to require his consent to the Alienation of a Benefice of his own Endowment. Which would discourage others to bestow their Liberality that Way.

4. It was once debated before the Lords, () but not decided; whether a Commiffion to fet Tacks granted to a Parson by his Parron, were sufficient to authorize Tacks made by the Parlon for longer than three Years. It was alledg'd, that no Commission from the Patron could have that Effect, more than he could Renunce the benefit of the Ad of Parliament, and leave the Parlon to him felf. In regard, as Curators cannot authorize their Minors by Commission: So neither can the Patron, as Curator Ecclesia, so authorize

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⁽a) C: 20: Extr: de Jure Patronat: Mackenzie Observ: in the 200: Act, 14: Parl: 7: 6. (b) d: Act 200. (c) July 6: 1666: Parson of Morum contra the Lairds of Beirford and Beinftoun. the

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the Beneficiary. And the Law requiring his consent to the Deeds of the Incumbent, was not calculated fo much for the Patrons private Interest, as for the Good and Advantage of the Benefice. As it is not necessary for the Patron to be confenting at the fubscribing of the Tack; but his confent may be adhibited either before or after: So it is sufficient, that this subsequent consent be either Exprels, by subscribing the Tack; or Tacite, by Deeds of Homologation: For a Patrons confent was infer'd from his accepting a Right to the Tack: (a) Altho this be authorizing in Rem suam. A Tack made by a Parson for more than three Years, was sustained as sufficiently authoriz'd by the confent of one as Patron, in whose favours another was decerned to denude himself of the Right of Patronage; fo as the succeeding Minister could not quarrel the same. (b) But prejudice to any deriving Right from the person ordained to denude, to claim preference as to the Patronage: The Decreet being only the ground of a personal Action against him for denuding. Tacks fet by inferior beneficed persons for more than three Years without the Patrons consent, would seem by the Act 200. Parl. 14. J. 6. to be simply null: Yet such were found valid as to three Years. (c) As Tacks of Burrow Rents (tho declar'd null by the 36.

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⁽a) January 19: 1669: Earl of Athole contra Robertson of Strowan. (b) In the foresaid Case of the Parson of Morum against the Lairds of Beirford and Beinstoun. (c) July 18: 1668. Johnstoun contra Howdown.

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Att, 3. Parl. 7. 4. if fet for a longer time than three Years) should be sustained, if restriction

ed to three Years. (a)

5. All Tacks must express the Contracters Names, Tack Duty, Ish and Entry. But the want of an express time of Entry vitiats not the Tack: For in fuch a cafe the Entry is understood to be from the Date, or the next Term. (b) A Tack wanting a Duty is noll quoad fingular Successors. (c) And Craig is of Opinion, that a Tack fet by a Prelate, tho for a Duty, is null, if the same be assign'd to the Tacksman. (d) But yet a Tack bearing a Discharge of the Duty was found valid: Altho the Discharge would not secure at the Hands of a fingular Succeffor; but would only operate against the Setter and his Hein. (e) Since all Tacks must have an Ish, if they be fet to a determined time; and that being elaps'd, to continue during the not payment of a Sum, or performance of a Deed: They are only effectual for the definite space exprest. (f) A Tack during pleasure lasts no longer than the Setters Lifetime; Quia voluntas morte extinguitur. (g) But may be revoked sooner, if the Setter think fit. A beneficed person who fets a Tack to begin after the Ish of a former, if he died medio tempore; the second

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⁽a) Mackenzie Observ: on the said 36: Act. (b) December 4: 1629: Oliphant contra Peebles: Stair Instit: Lib: 2: Tit: 9: S: 30. (c) Ibid: S: 29. (d) Feud: Lib: 2: Dieg: 10. (e) January 31: 1627: Ross contra Blair. (f) Craig, Ibid. (g) Spotswood Pratt: Title Tacks, Heretrix of Murray contra the Tutor of Sanguhar.

Tack

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Tack would be null: The Entry on't being confer'd in tempus indebitum after the Setters Decease, when he could have no Right. (a) For as Tacks fet by benefic'd persons, who are not in titulo the time of the Entry, are void and null: So the Entry cannot begin either after their Decease, Dimission, or Deprivation, fo as to oblige Successors to stand thereto; but only while they are in possession.

6. Tacks before they are clothed with pofseffion, are only confidered in Law as other personal Rights; and are not effectual against fingular Successors. But Tacks granted by benefic'd persons are real Rights without posfession, and will defend their Successors in Office. (b) For these are not properly singular Successors; fince they do not acquire or purchase, but Successors Titulo Univer ali ; not unlike fingle Incorporations, who are tied by their Predecessors Deeds: Or perhaps the Reason is, because Beneficiaries are but Administrators, and it is the Church that fets.

7. Some Tacks are called Rentals, as being the Constitution of fix'd Rents. The Tacksman is term'd Rentalier, to whom the Heretor indulges the priviledge of a kindly Tennent, or whose Predecessors have been antient Possessors and kindly Tennents. He pays a Graffum, or some Acknowledgment at his Entry. Rentals run longer than ordinary

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⁽a) June 18: 1629: Dumbar contra Turner. (b) Dirkeun Doubts, Pag: 195.

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Tacks; but if no time be express'd, they endure only for a Year: (a) Except in Ecclesia flick Feus, where they are presum'd to be Literent Tacks. (b) Rentals not express conceived in favours of Heirs, resolve in nated Liferents. (c) And those mentioning Heirs indefinitely, extend only to the first Heir. (d)

(a) Mackenzie Instit: Lib: 2: Tit: 6: (b) Craig: Feud: Lib: 2: Dieg: 9. (c) Act 68: Parl: 11: J: 6: Mackenzie Ol. serv: on the said Act. (d) March 13: 1632. Ahannay f Kirkdale contra Aiton: Mackenzie, Ibid.

SECT. III.

Of Ecclesiastical Pensions.

A N Ecclesiastical Pension is a certain Portion, or yearly Rent payable for a time, out of anothers Benefice. The Word Pension comes from pendere: Either because it formally depends upon the Benefice, as a jus usus fructus upon the Property; or

quod statis temporibus pendi soleat.

2. The Origine of Ecclefiastical Pensions is not so very clear; But they seem to have been introduced at first, as a mean of Subsitence to Incumbents, who through Sickness or Infirmities of old Age were turn'd unable to Officiat. For such were allowed to resign their Benefices, reserving to themselves Pensions out of 'em, as they might Live upon substantial.

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ably to their former Character. As Churchmen afterwards turn'd more Degenerate, and Benefices became Merchandize; Refignations and Pensions upon more trivial Reasons were Sustained. When two Benefices were excambed, the greater or fatter Benefice was burden'd with a Pension in favours of the lefser, to adjust and make them Equal. If the Right to a Benefice was contraverted, it was made lawful to compound the Matter by imposing a Pension upon the Benefice in favours of the Competitor.

2. The Pope that great Usurper of Ecclesiaftical Rights, pretending to the fole Power of burdening Benefices with Penfions, did exerce it so frequently, and arbitrarily in favours of fuch as gavehim Money; that the increasing of Simoniacal Pensions turn'd a Grievance here intolerable. For Remedy whereof, K. Fames Ift. reserv'd to himself the Cognition of Penfions obtain'd at Rome. (a) And by the 4 Act, I Parl. J. 2. No Pension could be purchased out of any Benefice without consent of the Possessor. Eccesiastical Pensions Authoriz'd by Decreets or Possession, were not prejudg'd by the general Annexation. (b) And those granted out of Prelacies, not Authoriz'd by Decreet or Possession in the Prelats Life, and before the Ast of Annexation were Null. (c) But yet Possession of a part of the Pension, though only for a Term

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⁽b) Act 29. Parl. 11. J. 6. (c) Act 137. Parl. 12. 3. 6.

before that Ast was found relevant to sustain the whole. (a) The Lord Directoun (b) states it as a Disputable Point, if a Bishop will be personally lyable, or at least if his Rens be affectable for the bygones of an Annual-rent, payable out of the Bishoprick to a pious Cause; which had fallen due, and run on in his Predecessors time? Her Majesties Advocar's Opinion (c) is, that the Bygones of a simple Pension will not affect the Bishops Successors; And he doubts if a Bishop can grant a Pension really affecting the Lands of Teinds of the Bishoprick. Pensions granted by Church-men should be special as to the Tenents names, and Duties. (d)

Benefices of Cure, Extinguintur morte gravantis, that they may not ly as a Discouraging burden upon the next Intrant. And with we Bishops could not burden their Benefices with Pensions for a longer time than their Right lasted; that the Successors might not suffer prejudice by any Deed of theirs. (e) But Liferent Pensions given by Benefic'd persons, are not only due during their Life, but after their Decease out of their Ann. (f)

5. We observe this Difference betwin Secular Pensions granted by Laicks, and Ecclesiastick Pensions granted by Church-men

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⁽²⁾ December 17. 1628, Chalmers contra L Craigieva.
(b) Doubts title Bishops Debts. (c) Notes upon the Doubts.
(d) Mackenzie Observ. on the 29 Act. 11 Parl. J. 6. P.
232. (e) Act 3. Parl. 18. J. 6. (f) February 28.
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That the former without Infeftment thereon? are but of the nature of Affignations, producing personal Action against the Granter, and his Heirs; and ineffectual against singular Successors. (a) Or against the the Terce of the Constituents Relict. (b) But Ecclesiafick Pensions clothed with Possession, or Decreets conform in the Constituents Life, are valid against their Successors in Office. (c) So a Pension granted by a Bishop, with a power to affign etiam in articulo mortis, was fustain'd in favours of an Assigney after the first Pensioners death, against the succeeding Bishop. (d) But not where neither the Assignation was Intimate, nor possession attained by the Assigney before the Cedents Death. (e) Anda Pensioner cum potestate transferendi having granted Affignation, referving his own Liferent, or to take effect after his Death: the Affignation was declar'd null by way of Exception, even after a Decreet conform, and 39 years possession. In regard the Assigneys Entry was confer'd in tempus indebitum. (f) But an Affignation to a Pension was sustained, albeit the Cedent died in the Possession; in regard the Assignation was intimated by a Summons before his Death. (g) A Decreet

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⁽a) July 9. 1629, Urquhart contra E. of Caithness. December 11 1662, Clappertoun contra L. Ednem (b) March 27 1634, Lady Dumfermling against the Earl. (c) Stair Institut. lib 2. tit. 5. S. 16. (d) July 23. 1625, Minister of Kirklistoun contra Whitelaw. (e) Penult June 1622, Bishop of Aberdeen contra his Tenents. and Drumlanrigs Son. (f) December 17. 1628, Chalmers contra L. Craigivar. (g) February 28. 1628, Maul contra Mathers.

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conform obtained against the Tenents, and Chamberlains of a Laick Granter of a Pension. is effectual against subsequent Tenents and Chamberlains, without a new Decreet, or Transferrence: But not against the Tenents and Chamberlains of the Constituents Hein (a) Yet an Ecclesiastical Pension is valid against the Granters Successor in Office, with out necessity of a Decreet transferring. (1) The Lords found that a Pensioner needed not to cite his Author the Granter of the Pension. to the obtaining of a Decreet conform there on: But only his Tenents and Chamber. lains, or other Intromettors with the Lands out of which it is crav'd. (c) Albeit no Action of Forthcoming is sustained, unless the principal Debitor be called; nor any Action for Implement of an Obligation, without citing the Granter. Penfions granted by the Queen are not arrestable in the Thesaurers hands: Because they are Alimentary, and Her Maje flies Service might otherways be obstructed. (d) The Lord Dirletoun states it as a Doubt, if payment of Pensions granted by the King may be denied? and if not, what remedy is competent? To which the present Lord Advocat Answers, That the only Remedy in such a case, is Moyen and Patience.

6. It is sufficient to deliver a Pension of Coals at the Coal-hill, and a pension of Vidu

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⁽a) Stair Institut. lib. 2. tit. 5. S. 17. (b) December 1630, E. of Carrick contra D. of Lenox. Stair ibid. (c) January 20. 1627, D. of Lenox contra Weems. (d) Stair Ibid.

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al upon the Ground where it grew, or at the Barn-door, without any necessity upon the Debitor of the Pension, to carry the same to the Pensioners Dwelling-house: who must dothat upon his own hazard and Charges. (a)

7. A Liferenter of Lands, or an Annualrent forth thereof dying after Whitsunday, and before Martinmass, doth transmit the half of that years Rent to his Executors; and the whole if he survive Martinmass. But one who had a Liferent-Pension out of Teinds dying in June after Whitsunday; it was found that his Executor had no Right to any share of that years Pension, & that the Teind could not in the least be therewith affected: In regard the Pensioner liv'd not till after the Corns were shorn. (b)

(a) March 7. 1628. Paip contra L. of Wolmet. (b) June 24. 1630, Scrimzeour contra L. Denmila.

SECT. IV.

How Rights are acquired from Beneficed Persons by Possession?

Possession is the detaining or keeping something by our selves, or others, for our own use and behoof. Commonly dissinguished into Natural and Civil Possession: Whereof the former is Real, and the latter presum'd. Without nicely diving into the Nature of Possession, to shew wherein it consists.

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fifts, 110wit is begun, continued, interrupted and lost: I shall content my self to enquire into the Point of Right arising from it, which

is sufficient for my purpose.

2. Tis the great priviledge of Possession that no person is to be turn'd out on't, but by Order of Law; or oblig'd to answer for Fruits bona fide confumed. Possession is not only an ordinary ground of Prescription, whereby the property of the thing posses'd, or some other Right or Claim is acquired to one, and lofto another: But also 'tis sufficient to exclude such as have no good Right; and is favourable in dubio. In a word, the Advantage by Possess. on is so considerable, that Men call it (by way of Proverb) eleven Points of the Law, and better than an ill Charter. Seven Years tawful and uninterrupted Possession the benefit of a Possessory Judgment. Which fecures the Party from being disposses'd, till his Right be reduced.

g. Fourty Years Possession induceth Prescription, whereby the absolute Right and Property of the thing possess'd is acquir'd and established, without a Title in Moveables; (a) and with any colourable one in Heretage: Against Church Men as well as others. Prescription likewise cuts off all Objections against the Validity of long Tacks, and Liferent Rights. (b) Nay, the Negative Prescription of Freedom is an effectual Security to the

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⁽a) December 7: 1633: Parishioners of Aberscherder control Parishioners of Gemrie. (b) Stair Instit: Lib: 2: Iit: 12: \$ 21.

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heretable possessor of Lands, against whatsoever Rights might affect the same, though
conceived in favours of the poor: As a Mordiscation to a Hospital having Overseers annually
chosen; (a) or any other pious Use. Unless the Hospital be founded to Orphans and
Minors; against which Prescription doth not
run. (b) This long Prescription is reckoned
de die in diem, per tempus continuum; without any
Abatement or Consideration of the time, when
by Surcease of Justice there can be no Process:
(c) And there is little question with us de bona side, in a fourty Years Possesor. (d)

4. But our Law hath introduc'd several short Prescriptions calculated according to the Nature of the Right. Ministers Stipends in particular prescribe quoad modum probandi, if not pursued within five Years: So that after that time, they must be proven to be resting unpayed by the Debitors Oath or by Writ.

(e) The Lords found, that a Mortification becoming a part of a Stipend did thus prescribe. (f) But the Act 1669. doth only concern the Prescription of Ministers Stipends: As being in effect Alimentary, and presumed not to ly over long unpaid. And was not extended to Tiends due to Bishops, or other Titulars. (g)

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⁽a) June 30: 1671: Beadmen of the Magdalen Chappel against Drysdale. 1b) December 29. 1691: Thomas Fisher Thesaurer of Heriots Hospital against Hepburn of Beirford. (c) In the foresaid Case of the Beadmen of Magdalen Chappel and Drysdale. (d) Stair Instit: Lib: 2: Tit: 12. § 11. (e) Act: 9: Parl: 2: Sess: 1: Ch: 2. (f) Mackenzie Observ: on the said Act 9. (g) March 20: 1683: Hamilton against Herries.

CHAP. IX.

Of Rights to Benefices acquirable by Beneficiaries.

A V I N G spoken to Rights acquirable by benefic'd persons; it remains that I treat of Rights they may acquire. When the State of the Church became fix'd and fenc'd by Civil Laws, Lands and other Possessions were confer'd upon the Clergy; some by way of Feu, others by Mortification. Some Rights again they acquir'd by Tacks, and others by Possession.

SECTION I.

Of Feus, Mortifications, and Tacks granted to Ecclesiasticks.

S O M E are of Opinion, that a Clergy Man is incapable by his Character to be a Feu-Vassal. (a) But according to Law, he may purchase Feus as well as other Men. (b) The Point is more disputable in the case of particular Monks, who acquire on-

(a) Zasius. (b) Graig, Lib: 1: Feud: Dieg: 14.

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y to their Monastry; and cannot serve as Vassals. The Doctors are not all of a Mind about the Question, if a Monk may be a Feuer. The more general Opinion is, that he cannot succeed as Heir to an old Feu; but may acquire Feudum Novum. With us Monks were understood as civilly dead: And so neighbor ther capable to enjoy Feus by Succession, nor Purchase. When they fell to Heirs, the Right of Succession accresed to the next Agnat; and new Feus disponed to them return'd to

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2. 'Tis the Conjecture of some, that Mortifications were fo called, because they are held as fast by the Clergy, as what is put within the Gripes of dead Men. But others look upon that Term as improper, judging these pious Endowments should rather go under the Name of Vivifications: Seing Church Men or Religious Incorporations are not confidered to die; and therefore property acquir'd by them Vivificatur, & nulli amplius mutationi submittitur. Mortifications pay no other Reddendo than Preces & Lachrimas, or the like. (b) And are not subject to Non-entry; (c) nor to any other Cafuality emerging from the Dearh of a Vaffal. Church Men also enjoyed their Lands with some particular Priviledges and Exemptions; whereby Princes and Superiors found themselves so nearly touch'd in the Matter of Interest, that according to the Laws of France, and Spain, and

⁽a) Ibid: Lib: 1: Dieg: 12. (b) Stair Instit: Lib: 2: Tit: 2: \$39. (c) Ibid: Tit: 4: \$ 20.

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some other places, no Mortification is effective al, without confent of the Prince. As to our Constitution, there is no doubt but Superiors will be shy to accept Resignations from their Vassals upon Grants of Mortification, in favours of a Community, or for the use of the poor: As being in effect a giving up of their Casualities. Nay, Craig is of Opinion, that, upon an Adjudication at the Instance of an Incorporation against their Debrors Lands. the Superior cannot be oblig'd to receive the Incorporation for a Years Rent. And my Lord Stair feems to be of the same Mind. (a) But withal proposes a very proper Expedient for falving the Interest of all Parties, viz. That the Incorporation Could affign their Debt to some person in Trust, to whom and his Heirs the Debtors Lands might be adjudged for the behoof of the Incorporation; and that the Seasin should express the Trust. By this means the Incorporations Debt would be made effectual; and the Superior might have his Casualities upon the Death, Neglect, or Delinquency of the Trustee. Albeit mortified Lands do not fall in Non-entry, and there is no necessity for renewing of the Infefement: Yet the Right is never compleat, till Infestment once be taken upon the Mortificati-To which a posterior Deed with the first Intefement will be prefer'd. (b)

3. I don't observe much difference in Tacks granted to Benefic'd Persons, from those made

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⁽a) Instit: Lib: 2: Tit: 2: § 41. (b) February 1682: Laird of Findouries go of the Town of Brockin.

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by them: Save that, 1. When the Granter is a Laick, they are not under such Restrictions, nor require such Formalities as the other. 2. A Laick having set two Tacks of Lands, the one to begin at the expiring of the other; the second Tacksman may remove the first when his Tack is run out, althouthe Setter be dead before that time. But such a Tack set by an Ecclesiastick of his Benefice, would be null: Because the Entry is made to commence at a time when the Setters Right expiréd. (a)

(a) June 18: 1629: Dumbar contra Turner.

SECT. II.

How Ecclesiasticks acquire Rights to Benefices by Possession?

HAVING formerly in my curt way defin'd & divided common Possession, and glanc'd at the main Rights and Effects on't: That which here falls under Disquisition, is the peculiar Priviledge and Advantage that Church-men in particular have by it.

i. Possession to Churchmen is often loco tituli, and a sufficient Right: Because these being conversant mostly about Divine Matters, are supposed to be ignorant and careless of their Rights which go not to Heirs, but dye with themselves; besides that they may be daily lost between hands in the change of Intrants.

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trants. So, in Possessory Judgements they need not found upon a Title, as Laicks are oblig'd to do; But are fecure till Reduction by seven years possession only. (a) And 12 years possession is equivalent to a Title, ac. cording to the Rule of Chancery, Decernnalin & triennalis possessio babetur pro titulo, even in causa falsi. Upon which account Prebendars were affoilzied from the Certification in an Improbation, for not production of their Provisions. (b) But this thirteen years Possession amounts to no more than a presumptive Title, when Churchmen have no extant Right, and goes off by a clear contrary Probation. For if their Title can be found, the Possession will be ascrib'd to, and regulated by it. And tho it cannot be taken away by Certification for not production, or not abiding by; It may be excluded by a better Right, or improven by positive Probation; And any Exception or Nullity may be proponed against the same when produc'd. So, an Infeftment of Annualrent mortify'd by the King to the Chappel Royal, was found extinguished by a voluntary Redemption thereof upon payment; Notwithstanding of thirteen years possession thereafter: In regard the Right mortified had a Reversion in the bosom on't. (c) The Desig-

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⁽²⁾ November 25. 1665. Peter contra Mitchelson. July 18. 1671. Earl of Hume contra L of Kislaw. December 6. 1672. Ventch contra Weatherlie (b) Hope Improbation, Bishop of Galloway contra the Prebendaries of the Chappel-Royal. (c) July 11. 1676. Bishop of Dumblane contra Kinloch.

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nation of Temporal Lands for a Glibe, where there was Churchlands beside, was reduc'd upon the 161 Act, Parl: 13. Fa: 6; Albeit the Minister as Possessor decennalis & triennalis had a presumptive Title: In regard the true Title by the Defignation was produc'd. (a) A Right of Annuity granted to a Minister out of theRents of aColledge by two of fevenMasters thereof, was found Null; Albeit the Receiver had been decennalis & triennalis Possessor: In respect it was not subscrib'd by the Majority of the Masters. (b) A Minister who had been thirteen years in possession of casting Peits, by a Right expresly precarious, was debar'd from that Priviledge at the Instance of the Heretor. (c) Another was not prefer'd upon the account of fo many years possession of Vicarage Teinds to the Titular or Tacksman; where the Minister's Title being a Decreet of Locality, did not include the Tithes in Question. (d) But yet a Minister having been thirteen years in peaceable possession of a certain Stipend, was not restricted to less by the Decreet of Locality; unless it had been proven that he or his Predecessors had own'd the Decreet as the Title of their possession; (e) Albeit the Debate was with a fingular Successor: who, seing a Decreet of Locality

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⁽a) February 6. 1678. Lord Forret contra Mathers. (b) February 1684. Barkley contra Provost and Masters of the Old Colledge of St. Andrews. (c) Mackenzie Observ: on the 29 Att 11 Parl: Ja: 6. (d) February 24. 1681. Lesley contra Minister of Glenmuck. (c) November 28: 1676. Semple azainst his Parishioners.

was in bonafide, one would think, to purchase without inquiring farther. It may be asked here, if absolute Rights granted to Churchmen can after thirteen years possession be qualified, or elided by extrinsick correlative Reversions, or Obligations? Sir George Mackenzie (a) doubts; but the Lord Stair (b) is

clear they cannot.

2. There is another Rule of Chancellary. concerning the Effect of Triennial possession; And that is, Triennalis pacificus poseffor beneficii est inde securus. Which is not so to be understood, as if three years possession afforded the benefit of a Possessory Judgement. (1) The meaning being only this. That the Incumbent's Right to a Benefice after 2 years peaceable and uninterrupted possession, cannot be quarrelled during his Lifetime by any other Candidate or competing Churchman. (d) Nay, so favourable and effectual is possession to Churchmen, that an actual Minister serving the Cure at a Church, and which he had continued to do for eighteen years before, was prefer'd to another having a prior Gift of presentation to the same Benefice, and obtain'd Letters conform in his favours. (e) This Rule about the three years possession, is the thiry third of the Roman Chancellary; but the other concerning thirteen years possession, is not to be found there.

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⁽a) Ibid. (b) Instit: lib: 2. tit: 8. 5. 29. (c) March
12. 1629. Marshal contra L. of Drumkilbo. (d) Stair Ibid.
tit: 1 \$. 25. tit: 8. \$. 29. (e) July 4. 1627. Mackenzie
Minister at Sclait contra his Parishioners.

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3. There Rules of Chancellary are the Form of Process observ'd in that Court at Rome; First invented by Pope John the 22d. There is a new Scheme of'em made by every Pope at his Inauguration, to last during his time. Whence one compares them to the Edicta metorum. They are of no Authority in Scotland, except in so far as they are adopted by our Custom: Such as these concerning the Triennial and thirteen years possession.

4. Three years possession doth also afford a priviledge to Patrons, That is, He who hath been in uninterrupted possession of presenting Ministers trind vice, or the three last times the Church did vake successively, in a competition with other Pretenders to the Patronage. hath the only Right of presentation in possession pro ea vice: But prejudice to the rest to declare their Right for the future, as ac-

cords. (a)

s. There is a priviledge of ten years possession introduc'd in favours of Ministers, by the 23 Act, 2 Ses: Parl: W. and M. which makes the Superiorities of patronate Benefices, that they were ten years in possession of, not to be

redeemable by the Sovereign.

6. As temporary and qualified Rights are acquired by Three, or Seven, or Ten, or Thirteen years possession: So absolute and perpetual Rights are gain'd to the Church by the long Prescription of Fourty years. (b) Yea.

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⁽a) Mackenzie Observ: on the 7. Act, Parl: 1. Ja: 6. (b) Them on the 61. Act, 11. Parl: Ja: 6.

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in regard the Popish Clergy at the Reformati. on turning desperate, did either fend Abroad the Rights of their Benefices, or suppress and destroy them; Partly out of malice to the Orthodox Clergy, and partly to gratify inte ressed Laicks: It was declar'd by an Ad of Sederunt 16. of December 1612, That ten years possession before the Reformation, or Thirty thereafter, should be a sufficient Right to Churchmen; Or to the King coming in their place by the general Act of Annexation 1587, So, Lands were infer'd to be Churchlands from Thirty years Possession by Churchmen of a certain Duty forth thereof: Altho another had been Immemorial Possessor of that Land as Part and Pertinent of his own Barony; And instructed by a Reversion produc'd, that some one of his Predecessors had expresty Wadfet the fame. (a)

(a) July 1626. L. of Kerse contra M. Andrew Reid.

CHAP. X.

Beneficed Persons considered as Subjects; and what they are liable to in that Capacity.

IS the duty of Subjects to contribute to the Support of the Government and Security of the Nation, by payment of Taxations and publick Burdens, Imposed for that end by King and Parliament, or a Convention of Estates.

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2. In former times Church-men pretended Exemption from these, as not being liable to ferve the publick with their Goods, but only with their Prayers and Tears. Philip August King of France, made once his Application to the Clergy of Reims for a Subsidy to pay his Troops. They stood upon their Priviledge and excus'd themselves from the Contribution: but affured the King they would Affift him precibus et lachrimis. That wife King, without hewing any Resentment prest the thing no farther. But soon after the Lands of the Chapter of Reims, being Invaded by Enemies, the Canons Implored the King's Protection, who made answer that he would also intercede for them with his prayers, as they had ferved him on a like occasion; Accordingly he wrote to the Enemy, praying them to spare the Patrimony of the Chnrch. But they who were not accustomed to give way to the King's prayers, but only to the Force of his Arms, had no respect to the Letter. Then the Clergy of Reims being sensible of their Fault, promised (if the King would help them out of that Strait) not only to be affifting to him with their prayers, but also with their Money, when he should have to do therewith. The King immediately took Arms and Relieved the Church. (a)

2. Ecclesiasticks alledg'd for their Immunity from Taxes, 1. That our Saviour doth affert it. (b) 2. Joseph excepted the Priests

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⁽¹⁾ Thomassin part 4: lib. 3. chap. 24: N. 3. (b) Mat. 17.26. M. Lands

Lands in Egypt from Pharaobs Cess. (a) But they were first brought over to a common Conformity by the specious pretext of Holy Wars; and induced to lay out the Tenth of their Revenues to promote Expeditions to the

Holy Land.

4. That which in the beginning was very extraordinary turn'd afterwards into a Cufrom; and 'twas no wonder that Princes finding the best portions of their Dominions fallen into Church-mens hands, indeavoured to affert their Prerogative over these in Subjecting them to the like Services and Duties as their other Lands were liable to. The decime papales & saladine came to be frequently in. posed: and the Pope and King together of Sometimes the Pope, for ten raised them. his own private Ends, or to advance fome Ecclefiaftick intrigue required them, and if refused, the Nation was sure to be interdicted; till which Interdiction was taken off. no Church Ordinance durst be Administred. That Taxations and Impositions might be the more equally raised off the Clergy, the Pope in the Reign of King James the third, sent Cardinal Bagimont to Scotland in quality of L. gat, who called before him all the Beneficed persons, to give up the Value of their Bene fices upon Oath; and made a standing Rental of 'em, called Bagimonts Roll: which became the Authentick and constant Rule for Taxing Ecclefiafticks; and ferved to direct

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⁽a) Genes. 47. 26.

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the Pope in Selling of Benefices to fuch as ap? ply'd to him for that end. But afterward upon new Informations, the Court of Rome us'd to make higher Valuations; To prevent which, all Benefices were Ordained to be Taxed conform to Bagimonts Roll, and no higher. (a) John Duke of Albany obtained of the Pope, an Imposition laid upon the Prelats, according to the Value of their respective Benefices, for Salaries to the Senators of the Colledge of Justice. The Clergy refusing to acquiesce, appeal'd to Rome, and Gawin Dumbar Bishop of Aberdeen was appointed to profecute the Appeal. But the Controversie dropt upon the Sessions being made to consist of 14. Ordinary Lords, half Spiritual, and half Temporal, and the President a Prelat, which distinction of Spiritual and Temporal Lords of Seffion was Supprest, and all Ordained to be Temporal by the 26 Act of the Parliament 1640.

Clergy-men ought to be lookt upon as Laicks, they were not only made liable for Tenths upon extraordinary occasions; and first Fruits and Annats to the Pope; and the fisch Penny of their Benefices to the King: But also came to be Subjected to all emergent Impositions laid on pro re nata by Acts of Parliament, or Convention of Estates for the common Defence of the Countrey, or other publick Exigences. (b) Only

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⁽a) Act 44. Parl. 6. J. 3. (b) Act 9. Parl. 2. Ja. 4. Act 277. Parl. 15. Act 2. Parl. 23. Ja. 6. Act 1, Parl. 1. Ch. 1, Act of Convention 4 August 1665.

the Chappel Royal by Act of privy Council in January 1584, and Ministers Stipends by the 162 Act, 13 Parl. J. 6. were declared free of Taxation. But yet by the Acts of Convention 1665, and 1667, Parlonages and Vicarages belonging to Ministers serving the Cure, were burdened with the publick Impositions, in so far as they exceeded the proportion appointed by Act of Parliament for a modified Stipend. And all Minsters having Stipend or Benefices, and even unplanted parish Churches, were once made liable in Pole-Money. (a)

6. The old way of Levying Subfidies in Sent land, was by Taxation according to the Retour, and Taxt-Rolls : whereof the Clergy payed the half; as having besides the Tithes the 4th partol the whole Land of the Nation in their possession, and being only Liferenters, & not Proprietars of their Benefices. Church-lands erected into Temporal Lordships, were Taxed frequently as before the Erection. But the Retours of the western Heretors being higher than in & ther Shires; and the Rents of Prelates and their much Impaired by Valuations of Vaffals Teinds, and Ministers Stipends: There was a new Valuation of this Kingdom made in the year 1660; wherein the whole Land-rent was given up as then possest, according to which Rental all Subsidies are now raised by way of Cess. Subsidies given in Parliament for a general and publick use cannot be other-

(a) W. and M. Parl, 1. Self. 4. Cap. 9.

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wise applied. - (a) But here it may be questioned if they be debita fundi, affecting fingular Successors? The Roman Law allowed the Fisk a tacite hypotheck in Lands for Taxes, and Tribute-Money. (b) Which could not be evacuat or disappointed by any Paction betwixt private Parties. (,c) With us all Subsidies laid on by the Parliament, are expresly declared in the particular Acts, imposing them to be real, and to affect the Ground; confequently fingular Successors. But an imposition tho by Authority of Parliament, without such a Clause for poynding the Ground, doth not seem to be debitum fundi, but only to affect the Intromettors and persons having Right the time it was laid on. (d) Cess was ordained to bear Annualrent after fix Moneths from its falling due. (e)

7. Bishopricks and Abbeys in France are liable to le droit de Gîte, a kind of free Quarters to the King, and Forreign Embassadors upon the Road. I have not observed any thing like this to have been in Scotland in time of Popery: save that the Monasteries were some times expressy obliged to lodge and Entertain the Bishops Officials, with four or five Horses, when they made their yearly Tour through the pa-

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⁽a) Act 9. Parl. 2. Ja 4. Mackenzie Observ. on the said Act. (b) L. I. C. in quibus caus pign. vel hypotheca tacit. contrah. l. I. C. si propter public pensitat. (c) L. 42. sf, de pactis. (d) July 13. 1664, Grahame of Hilton contra the fleretors of Clackmannan, Stair Institut. lib: 2. Tit. 6. S. 20. (e) Act 2. Sess. 2. Parl. I. Ja. 7.

8: The Kings Trumpeters pretending to an Allowance of 100 Merks from every Bishop as well as Temporal Lord, upon their obtain ing the Dignity of Lords of Parliament; and the Bishop of Caithness being Charg'd by ge. neral Letters to pay conform; he Suspended upon this Reason, that albeit some of the Bishops by way of Gratification might have given the Trumpeters what they thought fit at their Entry, it couldnot induce a Burden upon the Order, no fuch thing being impos'd by Law or Custom. And the Lords found the Bishop liable, if the payment of 100 Merks was made by Bishops at their Entry, as an ordinary uniform and constant fix'd Duty; but no otherwise. (a)

9. For the better provision of Universities, Fifty Pound was Ordained to be payed out of every 1000 Merks of Bishops Rents, and 40 Lib. or Six per cent out of every Thousand Merks of Ministers Stipends yearly, for Five years commencing from the year 1664 inclu-

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⁽²⁾ June 8. 1681, The King's Trumpeters contra the Bishop of Caithness. (b) Ch. 2. Parl. 1. Sess. 3: Cap. 24.

CHAP. XI.

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Beneficed Persons considered as Superiors, and Vassels; and the Nature of Ecclesiastical cal Superiority explained. What hath been the Fate of it in Scotland, and how Disposed of since the Reformation?

were allodial: But Superiority and Vassalage were Introduc'd by the Feudal Law. Such as had the Plenum Dominium granted Rights to others for performing some Service, or payment of some Duty. The Granter of these Rights we call the Superior, and the Receiver his Vassal. The Right transmitted by the Superior is term'd Dominium utile, and the Right Retain'd Dominium directum, for which the Superior should be Intest in the Lands disponed. Except when the Queen is Superior, who is Insest jure corone in all the Lands of Scotland.

2. There hath been Lands held of the Church, by all the different holdings of Ward, Feu, and Blench. Many forreign Princes held their Lands as Vassals of particular Churches. The Arch-bishop of Trondeim or Drontheim, formerly called Tronden, who is the Metropolitan of Norway, did once pretend that the Crown of Norway was held of his

Church .

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Church. And the Prince of Antioch did How mage to the Patriarch for his Principality. More as the half of the Rent of Scotland was possess as Benefices before the Reformation: and a considerable part of that consisted of Su-

periorities.

2. By the 29 Act, Parl. 11. Fa. 6. where Lands and Teinds are fet in Feu together for a joynt-duty, the King is Superior of the whole Tenendry, Stock and Teind; But has only Nine parts of the Common Duty, and the Church the Tenth. The Superiorities alto of all Lands and others Disponed or fet in Tack, and of Burrows of Regality and Barony, Heretable Bailliaries, and Stewartries, formerly held of the Church, are declared to belong to the King; and the Vassals Heirsto be Enter'd by Brieves out of the Chancellary; without necessity upon the Vassals to renew their Rights from his Majesty. Neither can his Majesty quarrel the same, being Confirm'd by him or his Predecessors, for bygone contravention of any Clause or Condition in their Infeftments; nor for Diminution of the Rental, if it be not of the old Penny-mail de liquido in liquidum; nor for conversion of Victual into Silver-duty, or any other cause, except for Falsehood, or for not payment, and performance in timecoming, of the Duties and Services contained in their Infefrments. This was carefully provided, for the Security of Vasials and Feuars of Church lands, against the King who is declar'd their Superior, and was a powerful party. When the Act cautions

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cautions that the King shall not quarrel the Vassals Rights, save only for a Diminution of the old Penny-mail de liquido in liquidum, that is. Feus being granted about the time of the Reformation for high, and renewed again for less Feu duties; the Feu should not be questioned, if it was not below the old Rental, Tho the Feu-duty were less than was once payed. The Lands and Lordship of Torphichen, are exprefly excepted from the general Annexation 1587; and yet is a Question presently sub judice, if Temple Lands be Church-Lands? (a) The Lord Thirlestane, whole Successor is now Earl of Lauderdale, having got the Lordship of Mussleburgh erected in his Favours, by King James the fixth, and excepted from the general Annexation 1587; The Lands of Easter and Wester Hails being a part of that Lordhip, were found to hold of the Earl, notwithstanding that the general Surrender was Subscribed by one of his Predecessors; the Act of Annexation 1632, doth annex Church lands without exception of Musle-Burgh. (b) In regard the said Act respects only these annexed by the general Act 1587: Mussleburgh, that was before specially excepted. not being expresly included therein. posteriores leges ad priores pertinent, nisi contrariæ sint. L. 28. ff. de legibus.

4. Upon the Submission by the Lords of

Erection,

⁽a) In the case betweent the Laird of Auchlossin, and some Vassals in Temple-lands. (b) 14 February 1705, Maitland against Brand.

Erection, and other Titulars in February 1628 by the 14 Att, 1 Parl. Ch. 1. The Superiori. ties of all Ecclesiastical Benefices, with the Casualities thereof, not disponed before the Commission of Surrender dated 17 January 1627, and in time coming are declared to pertain to the King referving to the Lords, and Titulars of Erection who subscribed the Surrender, the Feu-duties till redeem'd by His Majesty at Ten years Purchase, and upon paye ment to them of 1000 Merks for each Chali der, or 100 Merks of Feu-duty, or Hundreth Merks worth of all other constant Rent of the faid Superiorities; not being naked Service Whereas Feu-duties in common of Vaffals. Commerce give a higher price than Land. His Majesty was not only made Superior to the Erection Lords, but even to all the Vaffals of the erected Benefices, who were allowed to hold of the King if they pleas'd. And by an Act of Exchequer, (a) all was to be rec kon'd Superiority, whereof the Titulars of Erection, had not the property in their person before the Erection, nor acquired the same thereafter with possession preceeding the general Surrender.

5. Tho the Feu-duties be expressly reserved to such as subscribed the Surrender, yet in respect that cannot be known or made appear after so long a time, the Titulars Acknowledgement of the Kings Right, either expres-

ly or lent as 6. I 14th F referv' not R that R rity, I compr to be found alities by the ordain Feu-F feftme as the cordin unpay have] being purfue courfe

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⁽a) February 1. 1634.

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ly or by Deeds of Homologation; is equiva-

lent as if he had subscribed. (a)

6. Because in the Submission, and the said 146 Act, the Feu Mails and Farms are only reserv'd to the Lords of Erection during the not Redemption; Some doubt (b) if under that Refervation, the Casualities of Superio-rity, particularly Escheat and Non-entry be comprehended; Since inclusio unius would seem to be exclusio alterius. Yet the Lords of Session found Surrenderers to have Right to the Cafualities of Superiority, till they were redeem'd by the King. (c) And the 30 Act, 1 Parl: Cb: 2. ordains the Vassals to make payment of the Feu-Farms and Duties contain'd in their Infeftments, to the Lords of Erection; So long as the prices modify'd by the Commission, according to the Act of Parliament 1622 are unpay'd. However, they were found not to have Right to Arage and Carriage; (d) That being naked service of Vassals: Nor can they pursue Reduction of those Feus without concourse of the King's Advocat, having his Majesties special Warrand for that Effect. (e) But they may pursue Exhibitions against the Vasfals for clearing what Feu Duties they pay. To whom no abatement was allowed of their Feu Duty, upon account that the Lands by

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⁽a) 27. June 1662. Wat son contra Ellies. Stair Instit: lib: 2. tit: 4. S. 11. (b) Mackenzie Observ: on the 14. Act, 1. Parl: ch: 1. (c) July 24. 1632. Rule contra L. Billie. (d) In the foresaid Case of Wat son against L. Billie. (e) Mackenzie Ibid: June 24. 1664. L. Prestoun contra Nathaniel Ebred:

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Calamity of War were render'd desolate, and laid waste for some years: In respect the Feu Duty was small; and they might have gain'd as much in other years, as was lost during the

Devastation. (a)

7. The Lords of Erection by the faid 14th. Act, are expresly intituled to the Few Duties of their Vaffals, till redeem'd by the King: But it is not so clear, that they can also retain till Redemption, the Few Duties of Lands and others belonging to them in property before the Surrender. It may indeed be pled for it, That the Submission to which the At of Parliament relates, expresly declares, That the Lords of Erection their proper Lands and others, are not comprehended under the Surrender, but to be holden of his Majesty as before the Erections: And it were strange that they should be oblidg'd to pass from the Feu-Duties of their own Property without Satisfaction; and not from these of their Vassals Lands, in which they had far less Interest. 2. The Refervation in the former part of the Act, is understood to be repeated in the latter, with the lame Quality, fince nothing contrary is exprest: And many of the Lords of Erection were never put to answer for the Feu-Duies of their proper Lands. For these Reasons they were eas'd as to Bygones before the King was called in Question; But made lyable thereatter, as Sir George Mackenzie observes. (b) Who argues why it should be so, to this purpole.

⁽a) In the Said Case of Watson and Ellies, (b) Ibid.

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I. The Act of Parliament having expresly referv'd the Feu Duties of Vassals to their Superiors by Erection, till they got Satisfaction for the same from his Majesty, and not renewed the Refervation in the immediately subsequent case of their proper Lands; It is an A gument. That the Parliament defign'd the King should pay nothing for Feu Duties of the Property. Since Acts of Parliament are not to be extended de casu in casum, especially in such an unfavourable case as this, tending to deprive the King of a part of what he gave freely. ther, There was this Reason of the Distinction betwixt Feu Duties of the Superiors proper Lands, and those of their Vassals: They had no Interest in the Vassals Lands but the Feu Duties, and therefore were ordain'd to get a kind of easie Satisfaction for these. But the Property being fecur'd to them by the King's passing from his Reduction, it was highly reasonable in Contemplation of such a favour, he got the Feu Duties without any acknow-2. By Charters under the Great ledgement. Seal granted to the Lords of Erection fince the Surrender, and the Act of Parliament, they are lyable to the double Reddendo of a Blench Duty for their Interest in the Tithes and the Vassals Lands; And a few Duty for their own Property. 2. The pretence of not being formerly in use to pay Feu Duties for their proper Lands, is not Relevant; Because the King cannot be prejudg'd by the negligence of his Officers; Nor is it univerfally true, for the Earls of Roxburgh and others did pay. 8. It

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8. It were no doubt the Interest of the Vas. Sals, that the reserved Feuduties were redeemed and her Majestie might likewise find her Account in it, by getting a vast and sure Revenue But I never to this day heard more of any such Redemption, than what is insinuated by Sir George Mackenzie, in the end of the Supplement to his Learned Observations upon the Acts of Parliament. Where he informs, that some procur'd from the King Rights to the Feuduties, after he had redeem'd them from Titulars of Erection, or obtain'd from his Majesty Right to redeem the same: And so in Effect interpos'd themselves betwirt the King and his Vassals of Kirklands.

9. In the general Act of Annexation 1587, prior Dispositions of Churchlands are excepted, but the Superiorities of all Churchlands declared by the 14th Act of the Parliament 1622 to belong to the King, were by the 10th Act of that same Parliament annex'd to the Crown. By which all prior Rights and Deeds any ways prejudicial to his Majestie, as to the Superiorities & Few-farms of Church-lands, are declar'd null. To elude that A&, Commissions were obtain'd from the King for exercifing Acts of Superiority in thele Lands, by serving of Heirs, and receiving Resignations, Oc. with power to apply the Compositions and Casualities to their own use; Whereof some procur'd long Tacks for inconsiderable Tackduties. The Earl of Dumfermling having procur'd a long Tack of the Casualities of the Superiority of the Abbacy of Dumfermling, containing a Mandat to enter the Vassals:

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The Exchequer refus'd it, notwithstanding of Ratification thereof in Parliament, and a Letter from King Charles the Second, declaring that it fell not under his Revocation. (a) For by the 53 Act, I Parl: Ch: 2. all Grants of the Superiorities of Churchlands, with all Warrands, Tacks, Commissions, Bailliaries, or Deputations for entring of Vassals thereto. fince the Surrender were declared null. But fome Lords of Erection got Bonds from their Vassals in Churchlands, to continue their Vasfals and not to hold of the King, notwithftanding of the Act 1623 declaring him Superior of all Church-lands. To fecure which Lords of Erection, it was provided, That any new Right of Superiority of Churchlands obtain'd with consent of the Vassals, should stand good as to the Consenters. In regard that such a confent is of the nature of a Refignation of the Property, in favours of the Superior. be holden of the King. But prejudice to his Majesties Right of Reversion of the Feu-duties and Casualities, conform to the Act 1622. The Lords of Session did not think the single taking of Infefrment from a Titular of Erection, did infer such a consent, as the Consenter could not return afterwards to be the King's Valsal: But they found that it might be infer'd from Presumptions, shewing that the Vassal design'd to oblige himself to hold of the Lord of Erection, and not of the King. (b) Yet in Sir George Mackenzie's

⁽a) Mackenzie Supplement to his Observ: on the Acts of Parl. (b) July 28, 1669. Duke of Hamilton contra Weir of Blackwood.

Opinion,

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Opinion, (a) this Clause in the Act of Parlia. ment, can only be understood of a clear and express content to hold only of the Lords of Erection, and not of the King. Without which, the benefit to hold of the King for clearly introduc'd by the Act 1633, in favour of Vassals of erected Church lands, can hardly be taken from them.

10. By the 17. Act, 18. Parl. Fa. 6. Bishops were restor'd to their Estate and Dignity, but not expresly to their Superiorities: Thosome think that was tacitely done by the 14. At, z. Parl. Ch. r. in declaring that the King's being Superior to Erection vassals, should be no incroachment upon the Rights of Superiority, competent to Bishops and their Chapters. But now Prelacy, and all Superiority of Office in the Church, above that of Presbyter, being abolished, (b) as a Grievance to this Nation, and contrary to the Inclination of the Generality of the People, who were Reform'd from Popery by Presbyters: The Superiorities formerly pertaining to the saids Prelates, or their Chapters, or Depending Offices, were declar'd to belong to the King, without any Interpolition of another Superior, albeit the Vassal hould consent. (c) that if a Bishoprick were now erected in a Temporal Lordship, in favours of any particular person: One would think that person should not be Superior to the Vassals.

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⁽a) Observ. on 53. Att. I. Parl: Ch: 2. Seff: I. Parl: W. and M. (c) Att 29. Seff: 2. Parl: W. and M. in

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in the Case of Forfeitures, while they remain in the Queens hand, Her Majesty is Superior to the forfeit persons Vassals: And these, after the Forfeiture is gifted, turn Vassals to the Donatar. In regard many of the Bishops Vassals had such small portions of Land, that they were not able to go to the charges of expeding their Infeftments; The Signatures and Charters of fuch of them as are valued but at an hundred pound or under, are ordain'd to pass the Great Seal, per saltum gratis: And the special Services and Precepts for infefting their Heirs to be expede in the Chancellary for ten Merks. (a) If the valuation be two hundred pound, or under, and above one hundred pound, no more can be exacted for paffing of Signatures and Charters through the Registers and Seals, than fifteen pound, in fatisfaction of all Dues and Fees whatfoever. Nor are they bound to pay a Seafin Ox to the Sheriff, or any Dues for Æques exceeding the twenty part of their Few-duty. (b)

Patronage are now redeemable by the Queen, as the Superiorities of other Church Lands were by the Act 1623. Except, 1. Where the Feu Farms are a part of the Ministers Stipend, or where he hath been in possession thereof for Ten Years. 2. Excepting the Superiorities of the Provostries of Hamiltoun and

Bothwel. (c)

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12. Pro-

⁽²⁾ Act 32. Ibid: junct: Act 11. Sess: 7. Ibid. (b) By the said Acts 32. & 11. (e) Act 23. Sess: 2, junct: Act 36. Sess: 4. Parl; W. and M.

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12. Provostries and Prebendaries of Colle giate Churches, Altarages, and Chaplainries were not understood to fall under the general Annexation 1587. So, in a Competition betwixt Mr. Fobn Mackgil Arch-priest of Dumbar and the Kings Collector, (a) for the Superiority of some Lands holden of the Arch-priest before the Annexation; The Lords of Session prefer'd the Archepriest. Patrons of such Benefices did, in obedience to Acts of Parliament, (b) provide Bursars to them. Who thereby had Right to the whole Rents and Casualities, whether confisting in Property or Superiority, conform to the ancient Foundations, notwithstanding any Application in time of Popery, or Disposition by the King. But in regard these Titulars cannot be infest, nor the Vaffals of their Benefices know them from any Register; whereby the Vassals were put to a great uncertainty about their Superiors, till their Entry upon Retours and Precepts of Clare Constat, or Resignation and singular Titles by the Laick Patron holding immediatly of the King, (whose Infestment stands upon Record) was declared as valid, as if they had been enter'd by the Titular: Without necessity of any consent from the Titular, of others. (c) By which Act, Magistrats of Royal Burghs, that were formerly Patrons to Foundations of the foresaid Nature within their Bounds, are also declared Superiors to

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Parl: 12: 3: 6. (c) Att 34: Parl: 1: Ch: 2.

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the abovementioned effect of Entering Vassals. Yet the Laick Patron, as presumptive Superior, cannot pursue Reductions, nor claim the Liferent Escheat, or any other profits of the Superiority: All which fall and belong to the Titular the true Superior; unless the Vassal cannot shew who is the true Superior. (a) The foresaid Act of Parliament is only special. as to the Case of Patronages holden of the King by Infeftment. And therefore some Lands being mortified to maintain a Chaplain at S. Mary's Altar in the Church of Dumfermling. with this Provision, that the Founder and his Heirs Male should present the Chaplain; and the Lands being afterwards Feued, and of new again Disponed: It was the Opinion of my Lord Dirletoun, (b) that the Purchaser behov'd to be enter'd by the Chaplain as Superior; and if there was none, a Chaplain should be prefented. Since the faid Patronage was not by Infeftment, but Provision, and so came not under the Act. Nor yet is the Act, in the Opinion of that great Lawyer, to be underflood of Ecclefiastick Patrons; the same being made while Bishops were supprest: And therefore he thinks, that a Bishop, who is Patron to a Chaplainry, would not be Superior to the Chaplains Vassals. (c) But one of the greatest Lawyers of this Age (d) brings Ecclesiaflick, as well as Laick Patronages, within the Verge of the Statute.

⁽a) Mackenzie Observ: on the said Act 54. (b) Doubts; Title Altarage (c) Ibid. (d) S: J: Stuart, Notes upon Dirletouns Doubts.

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13. The Grants of Lands to Church Men, were only Verbal in presence of Honourable Witnesses, till the Reigns of Alexander, and David, when Donations by Charter came to be common.

14. It is the common Priviledge of a Supel rior, that he can oblige his Vassal to produce his Rights, either by way of Improbation, or in an Exhibition: And the King, as prefum'd to be Universal Superior of all Lands, may, by a Proclamation, or Improbation, or Ad of Parliament, ordain all Evidents to be produc'd; But they can only be declar'd null in an Improbation or by a Statute. (a) In a Reduction and Improbation at the Inflance of the Kings Donatar, as come in place of the Bishops, against their Vassals: It was found, That Minors could not be oblig'd to produce any Writs, except those specially called for; and that no Certification could pass against them, upon the general Clause in the Lybel. (b) But they were put to take a day to produce, the Pursuer condescending upon the particular Lands as commonly known and defign'd, and upon the Rights thereof crav'd to be reduc'd, and upon the Granters and Receivers; altho he should not be special, as to the Dates of the Writs. (c) In a Reduction and Improbation depending before the Session, at the Instance of Ross of Auchlossin against fome Heretors of Temple Lands: This De-

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⁽a) Mackenzie Observ: on the 245: Act, 15: Parl: 7:6. (b) January 20: 1698: Douglass against the Bishops Vassali (c) February 1: 1698: Inter cosdem.

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fence is proponed, but not yet Advised, That Temple Lands were Church Lands, and came within the Verge of the general Annexation 1587. So that the Pursuer could have no Interest to call for Production of the Rights of thefe.

15. Albeit Ecclesiasticks have absolute Right to the Rents of their Benefices during their Incumbency, and as Tutors can do all just and necessary Acts of Administration, such as the entring of Vassals and other Deeds allowed by Law: They cannot put their Benefices in a worse case than they found them in at their Entry, by changing the Vassals Holding, or otherwise. But all the Kings Vassals, whether Prelates or Barons, were allowed, for the better Improvement of their Ward Lands when they were barren, to subset the same in Feu to a competent Avail, that is, for the Retoured Duty; fo as the Sub-Vassal, upon falling of the Ward, should only be lyable to the King for his Feu Duty. (a) This Privileage of Feuing out Ward Lands was again indulg'd to Bishops. (b) But these Statutes were only Temporary: For Bishops under the last Establishment could not Feu their Ward Lands. (c) And yet it would feem, that Feuing doth afford a more constant Rent to the Church, than the Cafuality of Ward that seldom falleth; and when it doth fall, is gifted and dispon'd by the Titulars for the time to

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⁽a) Ast 71: Parl: 14: J: 2: Ast 91: Parl: 6: 7: 4 (b) Att 9: Parl: 23: J. 6. (c) Mackenzie Observ: on the said A# 9.

their own private use, without any benefit to their Successors: Whereas, by a competent yearly Feu Duty, the State of the Benefice is augmented and bettered; and there is less occasion for applying Church Rents to particular Uses. As the foresaid Acts were only calculated to a certain time, and not to be perpetually binding: So they were no Warrand to Bishops to Tax their Ward Lands for a certain Duty; that being contrary to the Interest of the Church, and also of the King, who would thereby be debarr'd from his Right to the Ward and Marriage fede vacante. therefore the Constitution of the Taxt Ward of the Lands of Blebo by the Arch-Bishop of S. Andrews, was reduc'd at the Instance of his Successor. (a) Albeit the Bishop might have granted effectually Gifts of Ward, Non-entry, and Liferent Escheat falling to him during his Incumbency, even for Years after his Death, or Removal; and also Gifts of Commissariot, or Bailliary, to continue during the Receiver Lifetime: And it would feem, that Taxt Ward is a more fix'd Rent than the Casuality of Common and Black Ward. But if beneficed persons were allowed to Tax their Casualities of Ward and Marriage, by the same Reason, they might dispose upon their Casualities before they fall, and Tax the other ordinary Casualities of Non-entry, Recognition, Elcheat, &c. and so quite dilapidate the Benefices. Nor was the succeeding Bishops Accep-

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⁽a) March 12: 1684.

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tance of payment of the Taxt Duty sustain'd as an Homologation to hinder him to reduce the Charter. In regard he could claim no more, till that was was taken out of the way

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16. The Superior, by his Dominium Directum, has not only a Title to Homage, and some Servile Performances from his Vassal: But also to the payment of the Duty contained in the Reddendo of the Vassals Charter, and to some Casualities. The ordinary Reddendo in Infeftments of Erection is a Blench-duty, and besides to pay to the Minister the Stipend therein mentioned; Of which the Heretor who buy shis Tithes by vertue of the King's Decreet Arbitral, was bound to relieve the Titular of Erection. Preces & Lachrima are all the Reddendo for mortify'd Lands, which are holden in puram Eleemosynam. Superiors have different Casualities according to the different Holdings: But some are common to all Holdings; As Non-entry, Relief, and Liferent-Escheat. Mortifications are not subject to Non-entry, and require no Renovation of the Infeftment. Relief is an acknowledgement pay'd by the Vassal at his Entry, for relieving his Lands out of the Superiors hands. The Entry of Heirs in Lands holden of Churchmen must be expede in the ordinary manner, either by Service and Retour, or by Precepts of Clare Constat: Except the Vassals of Church Lands in Orkney and Zetland, not

⁽a) Inter cosdem.

exceeding 20. Pound of Valuation, who bruik by the Udal Right without Renovation of their Intefements. (a) Which Udal Right requires no Title in Writ for the Enjoyment of Lands and Heretages, but only to be able to instruct Possession as Heretors by Witnesses, (b) But yet an Infettment to a person as Heir to her Father by vertue of a Charter up. on her own Refignation was sustained, and the Charter found equivalent to a Precept of

Clare Constat.

17. By the 32. Att, Parl. 4. 7. 5. the Life. rent Escheat of Vassals, that have continued Year and Day at the Horn, belong to their immediate Superiors; except in case of Treafon and Lese Majesty, when it falls to the King. Which was extended against beneficed persons, by the 49. Act, 3. Parl. J. 6. Yet the Statute doth not clear, whether the Casuality of their Liferent should fall as vacant Stipends to the Patron, or others having Right to them; or to the King. But Ministers Escheat, both Single and Liferent, belong to her Majesty: (d) Who will have Right to the Stipend, altho paid out of the Tithes of Lands holden of another Superior. (e) A Tack of Tiends for many Nineteen Years, exceeding the longest Life of any Man, will fall under the Liferent Escheat, altho there be no formal Constitution of a Li or Titl own I of his 18.

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Title 7: 6. Ibid.

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⁽a) W. & M: Parl: Seff: 2: C: 32. (b) Stair Inftit: Lib: 2: Tit: 2: § 11. (c) January 20: 1666: Lord Rentoun contra Feuers of Coldinghame. (d) Stair Instit: Lib: 2: Tit: 3: \$ 40: March 28: 1628: Fletcher contra Irvin. (e) Ibid.

of a Liferent.(a) But where any Tack of Lands or Tithes contain feveral Liferents, the Rebels own Liferent only, falls within the compass

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18. The Manses and Glebes of Ministers are more Allodial, than Feudal; having no express Holding or Reddendo. And by the 30. Act of the Parliament 1641, the Commission was impower'd to assign the Feu Duties of Parsons and Vicars Glebes to the Minister serving the Cure. But the Manses and Glebes cannot continue under any private Holding, being given to Ministers by Acts of Parliament; we consider them as holden of the King in Mortification. (c)

19. Sometimes the Property and Superiority of Lands are both Heretable, and come to be Confolidate and Confounded in one person. When the Property accresceth to the Superior, there's ordinarily no necessity of a new Infestment: For the Seasin of the Superiority carries the Property, if there be no other Proprietar. But it is not so in Ecclesiastick Benefices, which are only confer'd on persons for their Lifetime, whose Liferent Rights and Provisions doth entitle them to the Rents and Casualities no longer than they live. And therefore an Heretor of Lands holding of a Prebend of the Priory of Erail, coming there-

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⁽a) S: J: Stuarts Notes upon Dirletouns Doubts, Title Tacks of Tiends. (b) Act 15: Part: 22: 7:6. (c) March 28: 1628: Fletcher contra Irvin: Stair bid.

after to be Prebend, gave in a Petition to the Lords of Seffion, craving a Warrand to the Director of the Chancellary, to give out Precept and Charges to the Sheriff of the Shire to infeft him in these Lands: Which was granted, seing it could prejudge no body. (a)

(a) June 21: 1634.

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TREATISE

Church-Lands, and Tithes:

PART II.

CHAP. I.

Concerning Churches, and Church-Yards.



o D the Sovereign LORD and Author of all we possess and enjoy, doth challenge some part of our Lands for Churches, and Habitations to his Ministers: And for their Subsistence a Competency of our Rents,

or Incomes; commonly thought to be the Tithes. But many Princes, and great Personages, not content that the Church should have these

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these only, did out of a Principle of pious Zeal, richly indow Her with Lands and other Possessions also. From hence came our distinction of the Temporality and Spirituality of Benefices. Having hitherto treated of the former: we shall now handle the Spirituality. comprehending Churches, and Church-Yards, Manles, Glebes, and Titbes; Of which I am

to Discourse in order as they ly.

r. Churches are publick Houses erected for Divine Worship and Service, and for preaching the Word of GOD. Some thinking it a mean and derogatory thing to confine or circumscribe the Worship of GOD within Walls made with Hands, they would have no Churches among them, but perform'd the Sacred Rites in the open Air: As if the World it self only, were a sufficient Temple for the Author of Nature. But the Generality of Man-kind have gone into the Practice offerting Churches apart for Divine Service. About the Origine whereof there is much difference of Opinion among the Learned; which I shall not take pains to decide. Pagans as well as Jews had their Temples, whereof fome for the Curiofity and Magnificence of Fabrick, were esteem'd the Worlds Wonder. The Primitive Christians during the first three Centuries, while they wanted the Countenance of Secular Powers, were forc'd to take up with Church-Yards, in stead of Churches; and to serve the Living GOD among the They got afterwards into Churches, but were turn'd out of 'em by the fury of Dio-

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chesian's Persecution; and Restor'd by Constantine the Great. In whose time not only were the Heathen Temples converted into Christian Churches: But also many new and Magnissicent ones erected, for the Use of such as profes'd the Christian Religion. Constantine and other Princes had Portable Churches which they carried about, and made use of in their Travels and Warlike Expeditions. (a) The Fancy of building sine Churches, was as much humoured in Scotland as any where, and as early too. (Vid. Part 1. Chap. 5. N. 8. & Jegg.)

2. An antient way of founding Churches, was this; The founders made their Application to the Bishop of the Diocese, who came to the place where the Altar was to be fer, and said a Prayer; Then took up one of the Stones, which, having cut a Cross upon it, he laid with his own Hands upon the Ground-That being done, the Work-men receiving a Signal, proceeded to build. As the Building was got finished, and the Church indowed, and not till then, it behoov'd to be Confecrated by the Bishop: Yea, in some cases Re-consecration was us'd: viz. if the Church happen'd to be burnt down; or polluted by Murder, Fornication, or Adultery therein committed. The Romanists do at this day superstitionsly consecrate their Churches, and Church-utenfils, by various Rites and Ceremonies, by Holy Water, Unctions, and

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⁽a) Bruneman: de jure Ecclesiaftico lib; 2. cap: 2. N. 4. fprinkling

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sprinkling of Ashes, and Exorcisms; Butthere are no such Consecrations with us.

2. Having treated in another place (Vid. Part 1. Chap. 5. N. 8. & fegg. junct. Chap. 3. N. 9. 18. 6 (egg.) of the several kinds of Churches; all I shall do here, is only to observe, that the Pope behov'd to authorize the Erection of a Cathedral-church. (a) And in order thereto. us'd to appoint certain persons to inquire if the thing might be done, without incroaching upon anothers Right, and if it tended to promote Divine Worship. So, upon the Ap. plication of Bricius Bishop of Murray to Pope Innocent for the Erection of the Trinity-church of Spyny into a Cathedral for himself, and his Successors in that See; Commission was given to the Bichops of St. Andrews and Brechin, and the Abbot of Lindors, to make Trial if the Glory of GOD might be advanc'd, and no body prejudg'd by fuch an Erection: And upon their Report the Papal Authority was interpos'd to Legitimate the same. (b) The Bishops confent was fought to the founding of other publick Churches (c) Collegiat-Churches were ordinarly erected out of several Parill-Churches united for that Effect: And where these belong'd to different Patrons, all their confents behov'd to be obtain'd. So, the Lord Chrichtour Patron of the Church of Chrichtoun, being desireous to found a Collegiate

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⁽²⁾ Bengaus de beneficiis ad verba cum suo Reditu, Cap: 2. Part I. S. 2. N. 2. (b) Chartul: Moraviens. (c) C. nemo 9. de consecrat: distinct. I.

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Church, confisting of a Provost, nine Prebendaries, and two Clerks out of the Rents of Chrichtoun and Lochqubarret, a Menfal-church belonging to the Arch-bishop of St. Andrews: The Bishop's consent was procur'd, with a Refervation to himself of the Patronage of the Prebendaries and Clerks that had their Patrimony out of the Rents of the Church of Lochqubarret. It was Lawful to any Body to have an Oratory in his House, or upon his Ground, for the Use of his Family; Providing Mass was not therein celebrated. (a) For to the Celebration of Mass the Bishops leave was required; And feldom refus'd if there was just Cause for it, as the Remoteness of the Parish-church. (b)

4. Such was the Favour shown to Churches, that if any person began to build one, he, or his Heirs, might have been compell'd to finish it. (c) Great Reverence hath also been given to Churches. The Ethiopick Christians held it unlawful to enter a Church with covered Feet. Churches by the Canon-Law were Sanctuaries; but have not had that Priviledge in Scotland since the abolishing of Popery. According to the Civil and Canon-Laws, it was Sacriledge to steal any of the Sacred Implements or Furniture out of the Church. But we have no Statute against that formal Crime of Sacriledge, and yet so far consider Churches as Places to which a more than ordinary

⁽a) C. unicuique 33. Ibid. (b) C. Clericos 34, etc. si quis etiam 35. Ibid. (c) Nov. 131. cap: 7.

respect is due, that Thest or Murther, or Mutilation committed therein, is more severely punished, than any of the like Crimes com-

mitted elfe-where. (a)

5. About the fifth Century a fourth parto the Rents of the Church was generally fe apart for the Fabrick. But now fince the di stinction of Parishes, all Churches, except the Kings, and those de mensa Episcopi, are to be repaired by the Patron out of the vacant Stipends. (b) And where these faill, the burden of Building and Repairing the Church doth ly upon the Heretors: Who must stend themselves for that effect. But the Patron or In trometter with the Parsonage-Tithes is bound to uphold the Quire; and to pay the Thirds the Stent impos'd, where the Quire is no distinctly known from the rest of the Body of the Church. (c) If the Heretors refuse, being required by the Minister and Kirk-Session, to meet and stent themselves for Repairing the Church; The Lords of Seffion, upon a Bill given in by the Minister, will grant Warrand to him and his Kirk-Seffion, to conveen at a certain day for trying what Sum will repair the Church, and to stent the Heretors proportionably, and appoint a Collector to uplift To the making of which Stent-Roll the Here tors must be warn'd. Therefore, Horning 1 pon an Act of a Kirk-Seffion for Stent, was tound null ope exceptionis: The Parishioners not

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⁽a) Mackenzie Crim: Part 1. Tit: 19. §. 11. (b) And 18. Parl: 1. Ja: 7. (c) Penult November 1628. The Kirl of Selkirk contra Stuart.

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being cited, nor confentg. (a) But the Lords sustained a Charge against an Heretor for his proportion of a Stent impos'd for Reparation of the Church; albeit he was not present at the laying on of the Stent: that because of the last Act of the third Parlia-

ment of King James the Sixth. (b)

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6. Some have vented an Opinion, That such as have only Lands in the Parish, and their Residence else-where, are not oblig'd to contribute for repairing of the Church, as not having any Benefit there by the Minister's Preaching, or administration of Ordinances. (c) Others think, that Forreigners, or Outdwellers, having Lands in the Parish, are to be charg'd with repairing the Shell of the Church: But not to pay any proportion for the Bells, Seats, or Ornaments. Neither of which Opinions can be allowed. For the diffinction of the Latter is groundless, and without Foundation in Law. And as to the Former, it can as little hold: For all who have Lands in a Parish are considered as Parishioners, without respect to their Residence, as to all Parochial Burdens, which are proportioned to the Valuation of every Heretors Lands in the Parilb. and not to his Quality, or to his Lands in other Parishes. 2. All the Lands of a Parish may perhaps belong to a forreign Heretor: would it not then be ridiculous to impose the Burden of repairing the Church upon poor iers not

Tenents ? bein

^{(2) 23.} June 1625. Viscount of Stormont contra his Vas-(c) Carpzou; jus confiftor: lib: 2. tit: 2. Def: 349.

Tenents? And fince Heretors that are Outdwellers, may not only come to the Church, and reap Spiritual Advantage by the Word and Sacraments, as their Tenents do in their stead; But also may sit and vote in the Parishmeetings: Tis highly reasonable that they bear a proportionable burden with the other Heretors that reside there. But the I make no distinction betwixt Out-dwelling and Indwelling Heretors; These ought to be liable in the first place, who have bought their own Tithes, as having most Advantage by the Benefice, whereof the Rents, as I have hinted, (a) were once liable to these Reparations. (b)

7. I must not leave the Church without no. ticing the Seats in it, appointed for the Eale and Accomodation of the Parishioners while they are hearing Sermon, and joining in publick Worthip. Some of 'em are built and repaired at the general Charge of the Parish; In which all have a common Interest: But they may be dispos'd of by the Kirk-Session in Favours of Parithioners, according to their Ranks and Qualities. (c) There are other Seats which particular Heretors have built for their own use, with confent of the Kirk-seffion; or which they have prescrib'd a Right to by Fourty years possession, as part and pertinent of their Lands. Of these the Minister and his Session cannot dispose: But they are carried under a Disposition of the Lands. That is,

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when an Heretor dispones his whole Lands in a Parish, the Seat in the Church posses'd by him as part a pertinent, doth go with the Lands to the Purchaser. But a partial Acquificion doth not carry a partial Interest in the Seat. And a person who bruik'd his Lands and Seat in the Church by distinct Rights. having dispon'd the Lands with Parts and Pertinents to one, and afterwards the Seat to another; the Obtainer of the particular Right was prefer'd to the Seat: Albeit the Disponers Author and his Predecessors for many years had possess'd that Seat as Part and pertinent of the Land disponed. (a) Nor was Fourty years possession of a Seat in the Quire of a Church found sufficient to defend the Possessor, in a Removing at the Instance of one deriving Right from the Patron. Albeit the Seat had been built by the Possessor's Author, and bore his Name and Arms. gard it was alledg'd that the Purfuer not only pay'd a confiderable proportion of the Minitter's Stipend, whereof the Defender pay'd none, nor had any Arable-Land in the Parish: But also the Pursuer's Author was Patron of the Church, and as Superior of the Parish, had obtain'd Certification in an Improbation against all Rights to the Church or Lands. And whatever Title the Name and Arms upon the Seat might give to the Timber-work on't, they could not affect the Area of the Quire, as

^{(1) 23.} November 1698. Alexander Wilkison against With Lithgow.

being the Patron's Property. (a) In the City of Edinburgh the disposal of all the Church-seats, is ordered by the Town-Council, and the Rents appropriate as a partial Fund for payment of the Ministers Stipends.

8. The Heretors are bound to pay for, and are stated in the property of the Bells, Books, Utensils, and Ornaments of the Church: But the Minister and Kirk-Session, to whose custody they are committed, may pursue for any of them that are abstracted or taken away. A charge for a Stent imposed for buying of Bells to a Church within a Royal Burgh, was sussing the Landwart-Heretors, and even against such of 'em as did expressy oppose the Stenting. Albeit the Burgesses and Indwellers would have more Advantage by the Bells. But the Titular and those having Right to the Tithes, were not found lyable for the Third of the Burden, as in Reparati-

9. Every one must have some way to the Church; But cannot pretend to any special way as the nearest through anothers Land, without proving immemorial possession of such a Gate or passage: yet no Title of possession needs to be qualified, or condescended on. (c) A person was allowed to conjoyn his Predecessors possession of a Road to the

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⁽a) Sir William Binning against Sir Thomas Young of Rose bank, and Joussy of West-panse (b) February 15. 1642, Parish of Innerkeithing contra Lady Rosyth, (c) June 27. 1613, Neilson contra Sheriff of Gallowny.

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Church through his own Lands, to make up immemorial possession of the Servitude of that Road through these Lands, after they were disponed to a singular Successor. (a) Because the Road in controverly was not a private Road, but via vicinalis secured to all persons by publick Law; and Kirk roads are not tied up to the strict Rules of Law, especially where the Servitude is inoxiæ utilitatis, and of little

prejudice to the Servient-ground.

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10. Some in old time, especially the Martyrs us'd to be Interr'd in the Porch or Isles of the Church, for a memento of Mortality to o-And as Superflition grew under Gregory the Great, The Romanists began to bury in the very Body of the Church; that the Friends of the Defunct coming there for publick Worship, might by the fight of his Grave be put in mind, to fend up prayers for him. Tis with us the Custom to this day, to allow the Corps of some Persons of Note and distinction to ly in the Church; either for a reason of more Security to the Carcale from being violated by Rash and wicked hands; or as a piece of Deference to the Merit, or quality of the Defunct; or perhaps on both these For which a certain Acknowaccounts. ledgement is payed to the Poor, called in ancient time symbolum anime, or pecunia sepulchralis. These beside their particular Tombs or Grave-stones and Ornaments of their Body, have sometimes Coats of Arms, Penons, and other Ensigns of Honour hang'd up for their

Memory:

⁽a) Weems of Bogie against White of Bennochy.

Memory: whereof the Property remains the Executors; and to them actio injuriarum, and for Dammages is competent against such as pesume to break, deface or take them away. I don't altogether disapprove the laying the Bones of some Eminent Persons in the Church: But it was the Opinion of Joseph Hall Bishop of Norwich, That GOD'S House was not a meet Repository for the Bodies of the greatest Saints. Tho some be Interred in the Church, the most common Burying is in

the Church-yard.

11. The Church-yard is that Spot of Ground within which the Church stands. Fourty Paces about greater, and 30 about leffer Churches was the determined Extent of it by the Canon Law, and much the same respect was due the Church-yards, as to Churches: for both were Sanctuaries. (a) But the fince the Reformation we don't own them as Sance tuaries: Our Law allows to Church-yards and Churches equal Priviledges in many things, as the holding of Courts within Churches or Church yards was unlawful; (b) The raising of Tumults or Frays within Churches or Church yards during Divine Service, is punished with the loss of Moveables. (c) And Manslaughter there, doth make the Committers Liferent Elchear fall to the King, immediately after Declarator. (d) Thoughin Ordi

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⁽a) C. sicut antiquitus 17. qu. 4. (b) Act 86. quoniam a achiamenta. (c) Act 27. Parl. 11. Ja. 6. (d) Act 118. Parl. 12. Ja. 6.

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Ordinary cases the Liferent Escheat doth not fall, till the Rebellion is Year and Day old: & then it is due to the respective Superior. The keeping of Fairs or Mercats within Churches or Church yards, was once Discharged under the pain of Escheating the Goods. (a) But now thefe Acts as to Mercats in Church-yards are

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12. The Church-yard is Fenced with Dikes partly for Ornament, and partly as a Prefervative to the dead Bodies, from being Digg'd up and Devour'd by Beafts. The building and repairing of Churches, and Church-yard Dikes was once referred to the privy Council. (c) But now the Parishioners, that is the Heretors, must build and repair the Churche yard Dikes with Stone and Mortar two Elns high, with sufficient Stiles and Entries; and the Lords of Session are to direct Letters of Horning against them for that Effect. (d)

12. The Minister has Right during his Incumbency to the Church-yard, (e) and may shear the Grass on't for the use of his Horse or Kine, and may hinder others: But cannot cut the Trees growing there; Tho there is Action competent to him against those who do cut them. (f) If there should be a Coal found in the Church-yard, I think the

⁽a) Act 83 Parl. 6. Ja. 4. Act 70. Parl. 6. Ja. 6. (b) Mackenzie Observ. on the 83 Act 6. Parl a. 4. Act 76 Parl. 9. 2. Mary. (d) Act 232. Parl. 15. 14. 6. (c) Degge Parsons Counsellour, part 1. Chap. 12. (f)

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same could not be wrought by the Minister, or the Patron, or yet by the Heretors. Se. ing that would not only spoil the Ornament of the Church-yard; but also Invert the use on't: which can no more be done, than it can be sold. Now Church-yards or places destinated for burying are not in commercio; and so can neither be Feued, nor set in Tack.

(a) Craig Feud. lib. 1. Dieg. 13.

CHAP. II.

Of Manses, and Glebes.

the accommodation of Ministers, first appointed Dwelling-places to them at their respective Churches, (now called Manses, quia ibi manent) with a little portion of Land, which we term their Glebe, quasi Gleba Terra. And in after times, many Houses and Lands were Mortisted to the foresaid uses of Manse and Glebe. Because Church-men took often upon them to set their Manses and Glebes in Feu, or long Tack; an Act of Parliament was made, Discharging that pernicious practice. (a) Yet an Heretor to whom a Vicars Glebe

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⁽a) Act 79. Parl. 9. Q. Mary.

had been Fened a year before that Statute, was allowed, a proportional Relief off the rest of the Heretors of Church-Lands within the Parish. (a) All Parsons and Vicars Manses with four Acres of Glebe nearest to the Church, were excepted from the general Annexation; and appointed for the Minister to ferve the cure. (b)

2. What course was afterward taken for providing Ministers with Glebes and Manses. is shewed in the two following Sections. where they are leparately treated of. Only I must here add (what farther is common to both) That Ministers hold their Manse and

Glebe of none but the King. (c)

2. In the time of Prelacy, Manses and Glebes were design'd by the Bishop, or Ministers appointed by him, with two or three discreet Men of the Parish. (d) Yea, a Designation made by two of three Ministers only named by the Bishop, was approven, in regard no weighty reason of prejudice in the Matter was instructed. (e) And a Nottars Instrument of Designation upon a Warrand from the Bishop and Presbytrie was thought sufficient as a Seafin, tho not subscribed by the Ministers who Design'd : But a Testificat under their hands, was Ordained to be produc'd before Extract. (f) But now when Presby-

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⁽a) February 12. 1635, Cock contra Parishioners of Auchtergovan. (b) Act 29. Parl. 11. Ja. 6. (c) March 28. 1628, Fletcher contra Irvine, Stair Institut. lib: 2. tit. 3 9. 40. (d) Att 21. Seff. 3. Parl. 1. Ch. 2. (e) Feburuary (f) December 17. 1664, Watson contra Paterson.

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tery fways, that is done by the Presbytrie The Minister, or a Procurator in his Name takes Instruments upon the Defignation in the hands of a Nottar, or of the Clerk of the Presbytrie. And upon a Petition given in by the Minister to the Lords of Session, with the Act of Designation & Instrument; they will interpose their Authority, for Removing the Heretors and Possessor of the Lands design'd in the terms of the Act 48. Parl. 2. 7a. 6. So, Mr. Coline Lind(ay Minister at Kilbrandan in Seil. having lately (a) apply'd to the Lordsby a Bill, Representing that the conjunct Presbyeries of Argyle and Lorn, had defign'd a Le gal Glebe to him and his Successors in Office, together with Grass for a Horse and two Kine, presently possessed by such and such persons; wherein the Moderator gave him Infeftment in presence of the Presbytrie; upon which he took Instruments in the hands of the Clerk thereof; and that the faid Polsessors refused to give way to his Possession: Warrand was granted for Letters of Horning to Charge them to Remove within 10 Days.

4. The Proprietars of the Lands design'd, must get Relief pro rata off the Rest of the Heretors of Church-Lands within the Parish, if the Designation was out of Church-Lands; (b) not being old Glebes or Manses of Parsons or Vicars. For there is no Relief competent to the Feuars or Tacksmen of these, when lesed by a Designation out of their Pro-

⁽a) February 9. 1705. (b) AE 199. Parl. 18. Ja.6. portion

portion, except only against such as have feus of other parts of the said old Glebe or Manse. (a) When the Designation is of Temporal Lands, the rest of the Heretors of given in Temporal Lands are to contribute proportionally for Relief thereof. (b) By the At 31. Parl. 1644, Church-Lands Mortified to Universities. Schools, or Hospitals. could not be defign'd for Manse or Giebe: but fuch being Mortified to a Golledge, and afterward Feued for a small Duty, was found liable as other Church-Lands. (c) S. George Markenzic thinks that was a circumstantiate case, and doubts if it should be a Precedent for Church-Lands mortified to Colledges, and remaining with them. (d) This Relief competent to these out of whose Lands Defignations are made, the conflictute by A& of Parliament, was found, not to be devitum fundi, affecting fingular Successors, but only to burden the Heretors for the time. Because albeit the foresaid Action of Relief is competent against them, upon the account of Church-Lands they posses; yet the same is only personal. Yea, a pursuit for Relief not being commenc'd till eight or nine years after the Designation; these that were Heretors when it was made, were not found liable to pay Annualrent for the Sum decerned from

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⁽a) Stair Instit. lib. 2. tit 2 9. 40. (b) Act 31. Parl. 1644. Stair ibid. (c) February 12. 1635, Cock contra Pa-rishioners of Auchtergovan (d Observ. on the 199 Act, 14. Parl. Ja. 6. (d) june 24. 1675, Snow contra Hamilton.

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the time of the Designation: seing usure debentur only expacto, vel mora; and the Here tors had bona side possess de their own Lands, and made fructus suos. (a) Albeit the Notion of Relief imports to be relieved of all Dammage, under which the Interest of Money is commonly comprehended. For non est damnum quod quis sua culpa sentit; and here the Party might blame himself for not requiring payment immediately after the Designation.

(a) Dirleton Decis: 352. Stenhouse contra Heretors of Tweed. moor, 7 June 1676.

SECTION: I.

Of Ministers Manses.

THE Parson or Viccars Manse nearest to the Church was appropriate to the Minister serving the Cure there. (a) And those provided to Cathedral or Abbey Churches, where there was no Parson or Viccars Manse formerly, are to have one within the Precinct of the Cathedral or Abbey; unless the Prelate or Feuar Appoint them with another as good and commodious. (b) Yet if the Incumbent be not settled in an Abbey or Cathedral Church, but in some other, where no Parson

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⁽a) Act 48: Parl: 3: J: 6. (b) Act 116: Parl: 12: J: 6.

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or Vicars Manse hath been, or where it was burnt casu fortuito, he cannot claim a House to be design'd for his use, though standing up on Church Land. (a) But the Heretors must build a sufficient Manse not exceeding 1000 Pounds nor under 500 Merks of value. (b) Or the Minister may build one to himself, and get Repetition off them for what he truly expends in the building, not exceeding the foresaid Quota of 1000 Pounds. (c) 'Tis usual to allow half an Acre of Ground for the Manse and Yard.

2. By the 8. Act, 21. Parl. J. 6. all Bishops and other Ecclefiasticks were ordained to build and repair their Houses and Manses, and for fuffering them to decay, their Executors were lyable to the Successors, and those to the Executors for Expenses of Reparation made. But now, where there is a competent Manse already, the Heretors must repair it once sufficiently at the Ministers Entry, who is to uphold the same during his Incumbency; and they out of the vacant Stipend in time of Var cancy of the Church. (d) A Minister having, conform to an Act of the Provincial Assembly 1642, paid a certain Sum to the Relict of his Predecessor imployed by him in repairing the Manse; By which Act, the payer was ordained to have Repetition off his Successor: The Lords found that Act to be no sufficient War:

⁽a) February 11: 1631: Minister of Innerkeithing contra John Ker. (b) Ast 21: Sess: 3: Parl: Ch: 2. (c) January 8: 1670: Chartres contra Paristioners of Curry: (d) Ast 21: Parl; 1: Sess: 3: Ch: 2.

rand to cause the succeeding Minister reimburse the intrant Minister. (a) The Building or Reparation of the Manle affects not fingular Successors. (b) Nor are Liferenters subject to any part of the Burden of Building. (c) Albeit where Liferented Land is adjudg'd, the Liferent is stated to a certain proportion of the Property, according to the value on't, and Age of the Liferenter. But possibly a Life. renter by preservation wou'd be dealt with as an Heretor in this as in some other Cases. (4) And the ordinary Liferenters are not lyable to build Manses, they are bound to repair them. which requires less Expense, and cannot admit of Delay. As the Minister may build, so he may repair his own Manse upon the Expenles of the Heretors and Liferenters, who are respectively lyable to reimburse him of what he truly and profitably gives out that way: Unless they offer'd to contribute their own Materials, and he refus'd them. (e)

3. Churchmens Manses are not alienable, nor can they be set in long Tack. (f) Habitatio enim alii Habitanda, ex Jure Civili dari non potest. (g) And Domus Parochiales ad Secularem Usum non possunt transferri. (b)

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⁽a) January 1682: Mr. John Philp contra Mr: George Marison (b) January 8: 1670: Chartres contra Parishioners of Curry. (c) Nov: 14: 1679: Minister of contrathe Laird and Lady Beinstown. (d) Mackenzie Observ: on the 48: Act, Parl: 3: J: 6. (e) Ibid. (t) Act 72: Parl: 9: 2: Mary. (g) l: 8: ff: de Usu & Habitatione. (ii) Bruntoman: de Jure Ecclesiastico, Lib: 2: Cap: 3: N: 5.

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SECT. II.

Of Ministers Glebes.

A Ministers Glebe should consist of Four Acres of Arable Land, or 16 Sums Grass, where there is no Arable, but asture Ground; to be design'd in the first lace out of the nearest Lands belonging Parons, Vicars, Abbots, or Priors; and if there e none such, out of Bishops, Friers, or any other Church Lands within the Parish: (a) As Chaplainries, and Prebendries. was found, that this Order should be exactly blerv'd. (b) Therefore the Designation of Glebe out of Abbots Land was reduc'd, betause there were Parsons Lands in the Parish. hough Feued, and Houses built thereon: from which the Feuers were ordained either o remove, or furnish another Glebe to the Minister. (c) Another Designation was recinded, for that it was Temporal Lands, and past by Church Lands: Albeit the Minister. as Decennalis & Triennalis Possessor, had a Preumptive Title, in respect the Designation his true Title was produc'd. (d) But yet Sir G. Mackenzie observes, (e) that Bishops Lands

were

⁽a) Act 161: Parl: 13: Ja: 6. (b) July 13: 1636: Halyburton contra Paterson. (c) July 23: 1629: Nairn contra Boswal. (d) February 6: 1678: Lord Forret contra Mathers. (e) Mackenzie Observ: on the Act 48: Farl: 3: J: 6.

were design'd before Abbots Lands: In regard that Bishops had more Interest in the Cure A Defignation of a Glebe was sustained, albo it Four Acres precisely were not measured and marked out, but guess'd at: In regard the same did import, that the Possessors Servant hindred to measure in the Terms of the Act of Parliament; without farther necessity upon the Minister to prove the Impediment other ways than by the Designation it self. Nor was Improbation thereof admitted by way of Exception: Seing that wou'd lay a Preparative of pernicious Consequence to Ministers. (4) The designing of Church Eands nearest to the Manse for a Glebe, is partly in favours of the Minister for his Ease and Conveniency, partly to obviate Partiality in pitching upon any Heretors Lands out of prejudice. And therefore a Designation was found null at the Instance of an Heretor, whose Lands designid were remoter than others from the Manle, (b) But a Designation was sustained and approven, tho there was sufficiency of Church Land nearer to the Manle: Seing that was inclos'd as a part of the Kings Park. (c)

to the Church, the Minister should in place of the Four Acres have 16 Soums Grass out of the nearest and most commodious Pasture Church Lands design d for his Glebe. (d) According to the Order in the Att 161, Parl. 13. 3.6.

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F (a) July 5: 1626: L: of Kerse contra Reid Minister. (b)
Mackenzie, Ibid. (c) February 13: 1629: La. Dumsermling
contra Mackgill Minister there. (u) Act 7: Parl: 18: 3: 6.
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And farther, a Horse and two Kines Grass. over and above the Glebe: (a) Even tho the Glebe fuffice for Grass to two Kine and a Horse, beside the Four Acres; (b) to be design'd as the Glebe out of Church Lands, and with Relief to the Party distress'd. And if there be no Church Land near the Manse, or only Arable Ground, the Heretors of the adjacent Land are to pay the Minister 20 Pound yearly for his Grass, and to be relieved as said

is. (c)

2. No Incorporate Acres in Town or Village, where the Heretor hath Houses and Gardens are to be design'd for Glebes, if he give other Lands nearest to the Church: And no Ministers in Royal Burghs have Right to Glebes; d. Ach: 21. unless the Parishes be partly in Landwart, and partly in Town. (d) A Minister to whose Church another is annex d, has Right to both the Glebes defign'd before the Union; (e) as well as to both Stipends formerly paid to the Ministers of these Parishes: Seing the Church cannot be prejudg'd by the Union. But one wou'd think, that a Minister of two United Churches, whereof one hath a legal Giebe already design'd, and the other hath no Glebe, or one that is not sufficient, hath no Title to require another Glebe to be design'd for him; or to feek an Additional Designation to make up the deficient Glebe: That he may

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⁽¹⁾ Att 21: Parl: 1: Seff: 3: Ch: 2: (b) Mackenzie Obstro: on the 7: Act, 18: Parl: J: 6. (c) Act 21: Seff: 3: Parl: 1: Ch: 2. (d) Stair Instit: Lib: 2: Tit: 2: \$ 40. (e) January 22: 1631: Rough Minister of Innerkeithing contra Ker. have

have a competent Glebe for every Church No more than he wou'd be allow'd an Aug. mentation of Stipend, when the United Stipends, or any one of 'em do make up the legal Quantity. A Glebe was found to carry Right to a Proportion of Common Pasturage due to the Church Land out of which it was design'd. (a)

(a) February 2: 1630: Hamilton contra Tweedie.

CHAP. III.

The Historie of Tithes.

ITHES are a certain proportion of our Goods, and Rents, that is due for maintaining of Divine Service. A Subject that hath ever afforded plenty and variety of Debate through most Ages of the Christian World. .My project is to make it some better underflood than generally hitherto it hath been: And the first step in order to this, shall be to give as distinct an Historical Account on't as I can.

1. Tithes were voluntarly pay'd by Abrabam, vow'd by Facob, and the payment of 'em prescribed and qualified in Moses's Law; which the Heathens sometimes in their Practice copied after. But when or where the payment of Tithes first began under the Gospel Difpensation I cannot tell: Only we're sure it

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(a) 1. cap. 8

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chap: 5.

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was not before the 400 Year of GOD. For no Tithes could be pay'd in France before the Conversion of Clovis their first Christian King. Nay, Craig is of their Opinion, who write hat Pope Boniface the Eight introduc'd the payment of Tithes in France; Vocato in part m nede ipso Rege: Without whose consent the imposition would never have gone through. (a) The Saxons were not subjected to the avment of Tithes, till upon their imbracing he Faith in the Reign of Cb. the Great, about he year 780. (b) Nor those of Polland beore the Reign of Miciflaus the First. (c) And he Tragedy of Knout the Fourth is a cruel Evidence that there was no Warrand for payment of em in Danemark before the year 1081. (d) In Hungary I meet with no Vestige of Tithes till the year 1047. (e) Nor in Bavaria before the year 537. (f) The English date their Conversion to Christianity only from Augustine the Monk his Mission and Expedition into England, about the year 600: And Alfred was the first who pass'd a Law for the payment of Tithes there. (g) There being many Evidences that Ethelwolph's Charter is a Forgery. In Ireland, it was in King Henry the Second of England his time, that a Canon was

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⁽a) Feud: lib: 1 Dieg: 13. (b) Crantzii Metropol: lib: 1.cap 8 (c) Cromerus de Reb: Poloniæ lib: 3 John Herbert, Hist: Polon: lib: 2.cap 1 (d) Jo: Meursii Hist: Daniæ lib: 4. Saxo Grammati. Hist: lib: 11. Crantzii Daniæ lib: 4.cap: 37. (c) Vid: Aventin: Annal: Boiorum, lib: 5 p. 420. (t) Ibid: lib: 3. p. 194. (g) B Burnet's Hist: of the Rights of Princes, chap: 5.

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made in a Council at Cassiles 1171, ordering Tithes to be pay'd to Parish-churches. (4) Those who stand up for the most antient pay. ment of Tithes in Scotland, I mean Lefly and Spot(wood, do not alledge an Infrance of it be. fore Convallus, or Congallus the Second, as o. thers call him, who, they fay, appointed the Tenth of all Corns, Fruits, and Herbs, tobe. long to the Church. And the Learned Grain (b) will have the Custom of Tithing among us to be much of a date with the famous Late. ran Council in the year 1179. If thefe Instances were not sufficient, I could alledge the practice of some other Nations, where my Reading has carry'd me, for farther instructing that there was no certain payment of Tithes before the fourth Century. Origine (c) indeed argues from the Example of Moses's Law, that the Tenths should be offer'd to the Priessunder the Gospel. But according to Herm; Gigas, Constantine the Great was the first who commanded the payment of em. Yea, the Learned Bishop of Sarum (d) fays, That Pepin began, and Charles the Great fettled the payment of Tithes, and other Princes generally followed their Example.

2. When at first Tithes were demanded and brought into the Church, it was pretended, That they were to be distributed among the poor; and while Christians were in the Charitable Humour, the thing was soon yielded: But afterward the poor were put off

⁽a) Vid: Gyrald: lib: de Hybernia Expugnata cap: 34. Hoveden in Heur: 2. (b) Ibid. (c) Homil: 1. in Num. (d) Hist: of the Rights of Princes, chap: 4.

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with a Third of 'em; and even that in the end did dwindle into nothing, by the Clergies monopolizing all to themselves. Not content with the Predical-tithes injoined by Moses's Law, Personal_tithes came to be exacted. And towards the expiring of the Twelfth Century, Tithe was claimed for Hunting, Fishing, Honey, Trade, and the Commerce of Whores. the very Alms of the poor fays Spanbeim, (a)

was scarce exempted from Tithing.

3. In the Roman Diocele before the diffinction of Parishes, the disposal of Tithes, as of other Church-revenues, was challeng'd by the Bishop: Who made the dividend according to his Discretion, and dispos'd of the Clergy as he thought fit; fending them fometimes to one place, and fometimes to another. But the Burden growing too great for him at length, the Pastoral Care was divided into Parishes; and the Teinds of each Parish set for a provision to their particular fix'd Minister. Having formerly observed how and when the Parochial-division came to be introduc'd; (b) and also explain'd the Nature of Mother-churches, and those called Ecclesia Succursales: (c) It remains for us to shew what Right they had to Tithes. The Ecclesia Matrix was founded Jure communi in the Right of all Tithes within it's Territory. (d) Where a new Church was erected with the priviledge of a Parochial one, and independent on the former; The Rectors of both had Right to the

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⁽a) Oper Theolog: Par: 1 . Observ: in Cap: 27 Levit:infin: (b) Vid: part 1 . chap. 5. N. 7. (c) Vid: Ibid: & chap. 5. N. 26. (d) C. de decimus 16. qu; 1.

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Tithes within their respective Bounds or Precincts. (a) In the case of Chappels erected in Parishes without a Parochial-priviledge, and lerv'd by Vicars put in by the Parson of the Mother church for his own affistance, and for the Accommodation of his Parishioners; The Tithes ipso jure belong'd to the Parson; (b) That is the Tithe of Corn. And for the Vicars Subfiftance an inferior Tithe of other annual Increase was ordinarly set apart. Which gave occasion to the distinction of Parsonage and Vicarage Tithe. But then sometimes the Vicar got even a proportion of the Parlonage-tithe for his allowance; and sometimes a modified Stipend. Those other Vicars whose business was to officiat in Parish-churches annex'd to Cathedral and Collegiat-churches, and Monaitues, were maintained after the same fashion: The Parsonage-tithe being due to the Ecclesiaflick or Conventual Body. Our Learned Antiquary Sir Fames Dalrymple observes no mention in the Charters before King David's time of Persona or Vicarius. (c) But in a Provincial Council held in Scotland anno 1225, under Pope Honorius the Third (of the Statutes whereof there is a Copy extant in the Chartulary of Aberdeen) (d) we find Tithes ordained to be pay'd, iis ad quos pertinere noscuntur, i. e. personis & vicariis. Nay. The intrometting with

⁽a) C.ad audientiam 3. Extr: de Eccles: ædificand. vel repar.
Bengeus de beneficiis ad verbum Militia cap: 4. N. 31. (b) C.Ecclesiæ & duo sequentes 16. qu: 1. Bengeus Ib: N. 32. (c) Collections concerning the Scottish History, page 228. (d) cap: 35.

Tithes

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Tithes without Tacks from them, or their Farmers was once declared a point of Dittay.

(a) The Parochial-right of Tithes is now e-vacuated by the late Acts of Parliament, (b) which confer on Patrons all the Teinds of their Benefices, not heretably disponed, with

the burdens affecting the same.

ment of Tithes among us, was meerly the effect of Episcopal Tyranny, introduc'd about the twelfth Century; and settled with that Opposition and Reluctancy, that the Bishop of Orkney lost his Life in the Quarrel. As Piety and Charity decay'd, the Divine Right of Tithes began to be afferted in the Councils of the Church, and these Council-decrees were at length transcrib'd in the Body of the Canon Law: For the Clergy were extreme loath to own the Original of Tithes to Humane Laws, which are alterable.

g. But the Pope as universal Bishop, pretending a Sovereign Right to all the Revenues of the Church, took upon him to alienate Tithes to Monastries at Random. Nor hath his Holiness stood to sell them to Lay men: For all the Tithes in Italy, and most of these in Spain, are either appropriate by him to Monks; or seued to secular Princes and Laicks. He was once pleas'd to gratify our King James the Fifth with the Tithes of all the Parsonages

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⁽a) Act 7. Parl: 2. Ja: 4. (b) Act 23: Sess: 2. junct: Act 26. Sess: 4. Parl: W. & M. (c) Feud: lib; 1. Dieg: 13. Within

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within this Kingdom for a year. (a) And not only did he assume the disposing of Tithesthat were in the hands of Church-men; but even of such as Insidels possess'd: So Urban the Second gave to Peter of Arragon and his Souldiers, the Tithes of all Lands he should recover from the Saracens.

6. As he disposed of Tithes freely without Controul, he also granted Dispensations from payment of em, to such and such Religious Orders as he thought sit to have intirely depending upon the See of Rome: And particularly to the Cistercians, Hospitalers, and Templars, as to possessions they had before the Lateran Council. We have in another place (b) Historically described the Cistertian-Order, and shew'd how they came to be so priviledg'd: And because some possibly may have the curiosity to know as much concerning the Hospitalers, and Templars; I shall furnish my Reader with the History of em.

(a) Buchannan Hist: Lib: (b) Part 1. chap: 2. N. 8.

The History of the Hospitalers, for Knights of St. John.

THE Custom of Visiting pretended Holy
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dem. (a) Her steps were traced by many, oth Men and Women, notwithstanding the reat Dangers that attended such a Journey. among others, Peter the Hermite towards the and of the eleventh Century perform'd that peace of Ambulatory Devotion. Who Oberving the Distressed Condition of the Chrifian Inhabicants in Ferusalem. by the Opprefion of Infidels that were then Masters of the City: concerted with Simeon the Patriarch. how to recover it out of their hands. Being back'd with Letters from the Patriarch to Pope Urban 2, and the Princes of the West. he made his Applications to each of these lo effectually, and Represented so feelingly the faid posture of the Christian Affairs at Joufalem; that in a little time he got himfelf, in conjunction with Godfrey of Bovillon D. of Lorrain at the Head of a Numerous Armie, Levied out of all the Regions in Europe. Italy excepted. The defign, as they gave out, was to eradicate Pagan Superstition, and fet up a Christian Government in the Holy Land. ferusalem in the year 1099, fell in their hands, and Godfrey was chosen King thereof. which was much owing to the Valour of the Hospitalers, who Signaliz'd themselves at the Siege of that City, and for their Reward got Valt Possessions settled upon them by Godfrey, and Baldwin his Successor.

2. These Hospitalers were at first some Merchants of Melabis in the Kingdom of

⁽a) In the year 326.

Naples, Traders in the Levant, who a little before Godfreys Expedition procur'd leave from the Caliph of Egypt, to build in Jerusalem a House for themselves; and their Countrey men that should travel in Pilgrimage thither; on paying a yearly Tribute. After which a Church was erected in Honour of St. John, and an Hospital for the Sick, whence took the Name of Ho/pitalers. They bound themselves to the ordinary vows of obedience, chastity and poverty; and farther, to Defend Pilgrims against the Hostilities of Sa. racens. They turn'd a Military order, remarkable for their black Habit, and a Cross of white waxed Cloth with eight Points: Into which Order many persons of Quality listed themselves; and instead of Hospitalers, chose to be called Knights of St. John. They were rooted and expelled out of Syria at a time, when no Affistance could be had from the Western Princes, who had Game enough at Home, and were deeply ingag'd in intestine Broils. Then they posses'd themselves of Rhodes: which the Turks recovered out of their Hands in the year 1522.

3. The Emperor Charles 5th. in the year 1530, dealt and prevailed with them to ac cept of the Isle of Malta for their Residence: where they have long been a Fence and cover to Christendom from the Turks. Solyman in the year 1566, thought to reduce and extirpate them by a mighty Naval Force; which after the Expensive Fatigue of Four Moneths War, were necessitate to return re infecta. Princes have heaped Riches upon thele

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these Knights, and the Popes granted them wift Priviledges, and Immunities, whereof an Exemption from payment of Tithes was one. But after the European World began to be sensible of the gross Cheats put upon them by the specious pretence of Groifades, and to give over these vain Designs, the Credit and Interest of the Hospitalers decay'd, except in fuch places as were most expos'd to War.

4. In this Religious Order there are Knights, Noble by four Descents, Chaplains, and serving Brothers of many different Nations. The principal Convent or Hospital is at present in Malta: whereof the grand Mafler of the Order is Head, and Soveraign of the Island. In all Forreign Provinces where they have any Revenues belonging to them. there is a great Prior, whose Jurisdiction is called a Commandery or Preceptory. He from time to time holds Provincial Chapters; and must Account for what he does, and Receives. to the main Body of the Order in Malta. The chief Commanderies are for Knights, such was the Preceptory of Torphichen. There are others for Chaplains. A Commandery of Justice, is that which is bestowed upon one according to his long standing; Commanderies of Favour, are luch as the great Master or Prior has the Disposing of virtute officii. The Priors chuse the great Master, who is only Subject to the Pope in Spirituals; but owns the King of Spain as his Protector, to whom he prefents a Falcon every year. The Hospitalers came into Scotland in the Reign of King David. The

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Preceptors of this Order had Right to the Fore feitures of their own Tenents. The Governours of Hospitals appointed for poor Persons, or Invalides, were also called Preceptors; as the Preceptors of the Hospitals of St. Anthonic in Leith, St. Leonards beside the Borrow-muire, St. Thomas at the Foot Leith-wynd, St. Laurence near to Haddingtoun, and Ednem in the Merse. The Visitors of Hospitals are to be appointed by her Majesty. (a) And Actions for bringing Patrons and others; to Compt for their Intromissions with the Rents of them, are intented at the Chancellors Instance. (b)

(a) Act 1011 Parl. 7. 74.5. (b) Mackenzie Observ. on the 27 Act. 2 Parl. Ja. 1.

The History of the Templars. Where it is Debated if Temple-Lands were Church-Lands, and fell under the Act of Annexation, 1587.

THE Order of Templers was set up at ferusalem about the same time, and upon much what the same occasion that gave rise to the Hospitalers. Frequent Incursions being made into Godfreys Kingdom by Saracens, Turks and Egyptians, and the Roads leading to Ferusalem infested by Robbers; so as Travellers were much exposed to Danger: nine generous Knights (a) undertook the

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⁽a) Anno 1118.

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Defence of the Sacred Sepulchre, and to clear the High-ways; that Pilgrims and Passengers might safely come and go thither without

Hazard or Interruption.

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2. They propos'd at the beginning to live after the mode of Regular Canons, Subjecting themselves to the Vows of Celebacy, and obedience to the Patriarch of Jerulalem. This was done in the year 1118; and they were called Templars, because they had apartments allotted for them by Baldwin King of Jerusalem, in his Palace near to the Temple. These Templars subsisted for nine years, by the Liberality of the King, Patriarch, and other Ecclefiastick Prelats. But the Order was confirmed by the Synod of Troye en champaigne under Pope Honorius 2d, (a) and got a particular Set of Rules, and a white Habit assigned them in token of their Innocence. To which Eugene 3d, added a red Cross; (b) to signify their readiness to spend their Blood in Defence of the Holy Land. Among the Templars as well as the Holpitalers there were Knights, Priests or Chaplains, and Fratres Minores or Servientes: The Temand these Priests had Benefices. plats used to be Interr'd with their hands and Feet laid a crois; and their Standart was partly white, partly black; importing peace or favour to fuch as espoused the Interest of Christ, and Terror to his Enemies. They trictly for sometime adhered to the Rules of

⁽¹⁾ Anno 1128: (b) Anno 1140.

their Institution, and thereby exceedingly multiplied, and grew in Gredit and Wealth. Nay, as Matthew Paris relates, became richer than Kings. This we'll find less reason to think strange of, when we consider that people in those days, so posses'd with a Superstitious Opinion concerning the Merit of a Pilgrimage to Ferusalem, as if it had been half way to Heaven, may be easily thought to have been frank enough to Reward and Gratify such as afforded them safe Conduct, and Defended the Holy Places. Princes also, and great Men who enter'd into this sam'd Order of Templars brought their Treasures and Possessions with them.

2. But while the Templars swim'd in affluence and prosperity, they turn'd insolent, and insupportable. They disclaimed the Superiority of the Patriarch of Ferusalem, their Founder and Benefactor, and would own only the Popes Supremacy, who for Reasons of State cajoled them with many Priviledges, fuch as an Exemption from their Obedience to the Patriarch, and from payment of Tithes; and always interpos'd in their behalf, to get Justice done them in their civil Affairs. prov'd very ungrateful by open Acts of Hostility and Malice to the Hospitalers; who had been kind and bountiful to them at their poor beginning. Nor did the Hospitalers fail, as occasion offer'd to wreck their Revenge upon the Templars.

4. I omit for Brevities sake, the particular Relation of the Warlick Expeditions of the Templars

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Templars against Turks, Arabians, Saracens, and Egyptians; as not being necessary to my purpose. But I cannot forget the bold Answer given by Otto de S. Amando Master of the Temple, to Saladin, who having (a) taken him Prisoner, offered to Exchange him for his own Grand-Child that was a Captive in the Christians hands. It shall not be so, quoth the proud Master of the Temple, for our way is only to Ransom with the Sword: And therefore he chus'd rather to die under Confinement, than come off by the precarious method of an Exchange.

3. Maugre what Resistance the Hospitalers and Templars could make, Saladin, (b) by the force of his Arms, possess'd himself of Jerusalem. To Retrieve which Loss, and to Humble that Victorious Insidel, The decimae Saladinae were Impos'd by the Pope and Chri-

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6. The Templars having degenerated into Luxury, intemperance and effeminacy, they dissolved in a sad Tragedy. The Order after it had stood a matter of 184 years, being generally cut off in a cruel manner, through all the Christian World (except in Germany, where it was only Suppress'd) by the contrivance of Pope Ciement 5th, and Philip the Fair King of France. Who, being highly offended at the Templars, for that he suspected them concerned in the Tumults that arose about Debasing the Coyn; and having

⁽a) Anne 1180. (b) Anne 1187.

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also a Design to render himself Master of their Riches and Possessions, by his Moyen and Interest got Clement advanc'd to the Postifical Chair, upon his previously ingaging under Secrecy to abolish that Order of Knights. Their Ruine was commenced in the year 1307, by the French King who Seiz'd all such as were in his Kingdom, and Consistent their Estates. The like Cruelty was practis'd in other Countries.

7. The Pope, that he might effectually Gratifie his Patron and Benefactor, Supprest the Order of Templars, (a) in the Council of Vienne, (where he was personally present) not by way of Definite Sentence, fed per viam provisionis apostolica, irrefragabili & perpetuo valitura (anctione. And all their Lands and Goods were Declared to fall under the Difposal of the Holy See. A great part whereof by Advice of the Council was conferred upon the Knighrs of St. John of Jerusalem. I say that only a great part of the Temple-Lands were bestowed in favours of the Hospitales; because that Council decree reserves the Goods belonging to the Templars in Caffile, Arragon, Peringal, and Majorca; and fecular Princes applyed much of 'em to their own ule as bona vacantia. Yea scarce were the Templars Goods annex'd to the Hospitalers, without paying of great Sums. Their Possessions in Castile were Conficated, those in Arragon transferred to the Knights of Callatrava, and many retained by the Knights (2) Anno .1312.

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themselves. Spain did not allow of the Decree of the Council of Vienne. In Portugal their Lands were appropriated to a new Order of

g un Knight-hood then erected.

syear demned by the Fatal Sentence of the Synod 8. These unhappy Knights Templars conof Vienne, were generally Persecuted with Fire and Sword for the space of seven years, from the 1307, to the 1314. But in some places they escaped Death: as in England some of 'em enter'd into the Married State; and in Germany they were admitted into other Orders.

9. Some fay their Crimes brought Destruction upon them. But whatever was the caule on't, Authors agree that none of these ill things laid to their Charge were proven against them. If they were Innocent, it cannot be denyed but that the Pope of Rome, for all his pretence to Infallibility, and these of the Synod of Vienne have been either partial, or impos'd upon. If they were Guilty, and truly Criminal, that doth argue, every thing not to be Religious, which the Church of Rome calls fo.

to. The Templars came into Scotland, in the Reign of King David, where they flourished to that Degree, that there were few Parishes wherein they had not some Lands. The Prior of the Order resided at Torphichen.
Their Priests or Chaplains had Benefices, and
were Ministers of the Churches of Tulloch, Aboyn, Inchanan and Mary Coulter. The Hospital of St. Germans in Lothian belong'd to

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the Templars: But was Dissolved in the year 1494, and the most of its Revenue bestowed by K. James 4th, upon the Kings Colledge of Aberdeen. Sir James Sandilands the last Preceptor of Torpbichen made Refignation ad perpetuam remanentiam, in Queen Marys hands of all the Temple-Lands in Scotland, who Feued them out again to him for 11000 Crowns, and the yearly Duty of 500 Maks. Augmentation of her Highnels Renal The Temple-Lands being Erected in favour of James Lord Torphichen; he Disponed them all for 10000 Merks, to James Tennent of Lynbouse, and Mr. Robert Williamson Writer in Edinburgh, except the Lands of Torphichen and Listoun, lying within the respective Shires of Edinburgh and Linlithgow, those of Dennie in Stirling-Shire, Thankbortoun in the Shire of Lanerk, Balintrodo in Edinburgh-Shire, and Ma ricoulter in the Shire of Kincardin, Together with his Right to the Churches of Torphichen Temple, Inchmajn, Marycoulter, Aboyn, Tulloch and Kilbartha, and the Teinds and Rents there of; Some Temple-Lands in East Lothia and Fife, were afterwards made over to Mr George Lauder of Bals, and these within th Sheriffdom of Perth, and Stewartry of Stra thern, to David Lord of Scoon. And yet In ment and Williamson convey'd their wholeRighthim, f with confent of the Lord Torphichen, to The ects of mas Lord Binnie, afterwards Earl of Hadding their town; By whom the Lord Scoon's Right was becalant Ratified; and the Temple-Lands within the Shires of Dumfries, Lanerk, and Wigtom an

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and within the Stewartries of Annandale and Kirkeudbright, were transfer'd to Captain William Ross, and came from him by progress in the person of Rols of Auchloffen, who having rais'd a Reduction and Improbation of the Rights of the Possessors. It was alledg'd for the Defenders, they were not bound to produce their Evidents to the Pursuer, because Temple-Lands were Church-Lands, and confequently fell under the Act of Annexation 1,87, and that they were Church-Lands was d them

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I. The Templars were an Ecclefiaffick Orriter in der instituted by the Patriarch of Ferusalem en and for a pious Use, subject to the Tria Vota nires of Substantialia Religionis, Poverty, Chastity, and mnie in Obedience, which were at first administrat to hire of them by the Patriarch. 2. They had Priests nd Mar among them, and have been reckon'd Eccleogether fiasticks by Divines, Canons, and Canonists.

rephicher 3. They enjoyed the priviledges of Church-Tullock men, being exempted from Civil Jurisdiction. 4 The Order had its Confirmation from a Council of the Church, who prescribed them to Mr Rules and Habit, to which the Pope added a thin the Red Crofs to be worn by the Knights and of Sine Priests. 5. Pope Clement the 5. in his Epistle to yet In the King of France (a) expostulates with oleRight him, for having imprison'd the Templar Sub-Hadding their Estates, which did not belong to the ight wa becalar Power. And the Doctors of the Sor-

⁽¹⁾ October 27: 1307.

bon, by their Resolve, (a) Declare, That those who are lifted for the Defence of the Faith, and bave made Profession of a Religion established by the Church, ought to pass-among the Religious, and enjoy the Benefit of Exemption; and their Estates should be reserved to the Ends for which they were conferred on them. Nor would the Pope suffer King Philips Process to go on against the Tem. plars, till once the King had put some of the principal of 'em in the Hands of his Legates, The Pope also reserved to himself to judge the Great Master of the Temple, and the Masters or Heads of the Order in France, and beyond Seas. At length, by the Pope in a Council of the Church, the Order was supprest, and their Estates dispos'd of.

It was Answered for Auchlessin, 1. The Templars constantly pass'd for a Military Order, and were improperly called Ecclefialticks; being originally institute, not for any fingular Spiritual Perfection, such as Devotion or Charity, but for Guarding the High Roads with Force of Arms; whereby they were exercis'd in Blood and Violence: And no more Ecclefiasticks, than the Popes Guards, or other Princes who engag'd in the Holy Wars, or even the Souldiers that served under them in thele Expeditions, who all wore the Badge of the Red Cross, and received from the Pope the Red Standart. Neither were their Vows like thole of the Religieux: For their Vow of Chathity did not tie them up to a single Life, but impli

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⁽a) March 24: 1308.

implied only Continence, which might have been observed in a Married State; 'Obedience with them, was only Submission to the Mafter of the Order; and their Poverty, a meer Restriction not to acquire without a Dispenfation from the Grand Master, a thing as often granted as required. (a) Farther, the being ned to Vows, was not the main end of their Institution; but some thing accedens præter naturam. Albeit they made their first Vows in the Hands of the Patriarch of Ferusalem, as Vows in these days us'd to be made in the Hands of Church Men; they were not for that Ecclefiasticks: Such a Ceremony being only us'd for the more Solemnity, and in order to obtain the Patriarchs Benediction. 2. Tho this Order had Priests belonging to it, that doth no more make it Ecclesiastick, than the Order of the Garter can be reckon'd a Religious one, from their having S. George for Patron, and a Prelate for Chancellor, and Register; Besides a Dean and Canons, and Twenty Six poor Knights to pray for the Order. As to the Opinion of Canonists; This in general is to be observ'd, that where they belong to a Countrey or Order much devoted to the Church of Rome, they are usually sway'd to think the Military Orders of Knighthood to be Ecclesiastical: And those who are more free, and less depending upon that Church, incline to the Opinion, that these Orders are Secular. 3. The Doctors, who generally al-

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⁽a) Carleval: de Judiciis, Tit: 1: Disp: 2: Sect: 3: N: 406.

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low them Privilegium Fori, are very far from granting, that they were a Religious Orders (a) This Exemption was the Effect of their Greatness, and the Indulgence of the Church of Rome; but did not alter the Defign or Cha. racter of the Order from Secular to Ecclefiastick 4. The Templars were several Years institute before they were confirmed, or received any Rule or Habit from the Council of Troyes. As to the extraordinary power the Pope did arrogate to himself, in the Trial, Suppression and Disposal of the Goods of the Templars; it will amount to no Argument with any who are in the least conversant in the History of these times; wherein there was nothing civil exempted from the ambitious Pretentions of these Pontifs. And yet in this Matter the Pope proceeded by his own Confession, without observing the Forms of Law or Justice: Which, if the Templars had been an Ecclefiaffick Order the Pope and Council would never have confess d. For it is but too well known, with how much Arrogance they pretend to dispose of Ecclesiastick Orders and their Revenues. However this Decree, after all, was no where made effectual to the Knights of S. John, without payment of great Sums. And the Application of the Temple Lands in their favours was so qualified, as it might not pro judge the Rights of Princes. As to the Judge ment of the Colledge of Paris; There is no doubt, but this Order having a Resemblance

(a) Carleval: Ibid.

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of a Religious one, did plead an Exemption both from the Secular Jurisdiation, and from the ordinary Jurisdiction of the Church; and were only subject to the great Master: By whom their Benefices were conferred pleno ire, and their Vows dispens'd with. farther, Mariana observes, that sometimes the Order proceeded to depose their Master, to accept of his Resignation, and to chuse a new one, without the Popes Licence or Confirmation. 'Tis also to be observ'd, that the Dodors of the Sorbon do not call the Templars Religious, but only fay, they ought to pass amongst the Religious. As to the Resolution concerning the Application of the Goods of the Templars to the ends for which they were at first conferred on them: That doth not determine, if the Goods were Ecclefiastick or not; but was a Check upon the Avarice and 5. 'Tis observ'd Revenge of Philip the Fair. in a Manuscript suppos'd to be Sir John Nisbels, that, in Solemn Processions, or Meetings of Parliament and Convention of Estates, the Preceptors of these Orders were ranked with the Laity; and as fuch were Tax'd in order to the payment of publick Burdens; nor were their Lands comprehended in the Acts touching the Assumption of the Thirds of Benefices. And albeit they had Churches, whereof they were the proper Patrons, to which my Lord Torphichen pays yet a considerable Stipend: Yet that did not make them Ecclefiastick.

In the foresaid Reduction and Improbation, this point also fell under Debate, if, upon the

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Supposition that Temple Lands had been on ginally Church Benefices; They be not excepted in the Act 1587, and if that general Exception be taken away by the Acts 1622

and 1661.

It was alledg'd for the Pursuer, That effe they had been Church Lands from the begine ning; Yet the Order being suppress'd 200 Years before the Reformation, the Act of Annexation made upon that occasion does not comprehend Temple Lands, which had fallen to the Crown long before, not upon the general Account of Reforming the Errors of the Church of Rome; but because Croisades, and the end for which the Order of Templars was instituted, the affording Reception and Safe Conduct to Pilgrims at Jerujalem, Was of a long time ceas'd. 2. Tho Temple Lands fell under the Act of Annexation, they were again excepted from it expresly in a Clause concerning the Lands and Lordship of Torphichen, which was not taken away by the general Act 1633. Since illud non agebatur to take away the special Exceptions; but only to extend the Act 1587 that only concerned Benefices then posses'd by Church Men, to the Right and Superiority of all Lands erected before or after the General Annexation. these Reservations being in a Solemn Act full 40 Years before the 1633, must yet subsit, unless they had been expresly rescinded. 3. "Tis true the Act 1633 mentions the Superio; rities belonging to whatfoever Abbacies, Priories, Prioresses, and Preceptories: But that

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s to be taken in a proper Sense, so as not to be understood of Commendams or Preceptones pertaining to Military Orders; these being but a Resemblance of Benefices. And for clearing that these Acts do only concern the Benefices of Churches, Abbeys, Convents, or Hospitals; The Act 1587 narrates, That our Sovereign Lord perfectly understanding the greatest part of his proper Rent to have been given away to Abbeys, Monastries, and others of the Clergy, for Caules found to be neither profitable nor necessary; It is meet and expedient for the King, to have Recourse to his own Patrimony : Therefore His Majes by and Estates unite to the Crown all Lands, &c. which then pertained to Arch-Bishops, Bishops, Abbots, Priors, Priorefles, or other Prelates, Ecclesaftick or Beneficed Persons of what ever Estate. and to Abbacies, Convents and Cloifters of what ever Order of Friers, Nuns, Monks, or Channons. And albeit the Act 1622 adds the Word Preceptories, yet it plainly relates to the Act 1587. and concerns the same Subject, with this Extension only, That whereas the Act 1587 was confined to Benefices in the Possession of Church Men at that time; The Act 1623 doth annex all Lordships erected before or after the Act. And the Additional Word Preeptories is only to be understood of Ecclesiaflick Preceptories.

I return from this Digression, which perhaps is carried too far, to prosecute my Dis-

course concerning Tithes.

A Continuation of the History of Tithes.

TO secure the Papal Grants of Alienation and Exemption, from being called in Question upon the account of the Divine Right of Tithes: The School men maintain'd a competency out of them to be due de jure divino; but that the particular Quantity of a Tenth was of Ecclesiastical Institution.

2. The Pope having usurped such a boundless Liberty of appropriating Tithes to Mona. ftries, or otherways disposing of them at his pleasure, and granting Exemptions to severals of his Creatures and Favourites from pay. ing Tithes for their own Lands, to the great prejudice of the Parochial Ministry; Our Law to exclude these his unjust pretences; made it criminal to take a Right of Tithes from any fave the Parsons or Vicars, or their Farmers. (a) For the Kings and Parliaments of Scotland have been alway Zealous in maintaining the Regale and Rights of the Church against all Romish Usurpation. But at the same time Tithes in this Country were frequently mortified to Cathedral and Collegiat-churches, Chappels, Monastries and Nunneries, by the Founders and benefactors. To these also Parish-churches with their Tithes were often annex'd by the Patrons; so that the Prelates of Churckinds

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⁽a) Ad 7. Parl; 2. Ja: 4.

Churches and Monastries had Right to two kinds of Tithes; One belonging to them simply by Mortification from Lay-men; Another to them only as Parsons of Parishes. This leads me unawares to inquire how and when Tithes came first into the hands of Laicks?

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2. This is certain, that Lay-men injoyed Tithes, and disposed of them freely for several Ages under Christianity. But the Learned are extremely divided in their Sentiments about the Origine of Infeudations of Tithes. Some extravagantly will have them to be more antient than the Church it felf: Because Cicemand other Pagan Authors mention Tithes to have been raised by the Romans out of their Provinces. Other place their Beginning under Philip August, in the time of the Holy War. A third fort derive it from Charles Martel. Without standing to dispute which of these are most in the Right, I shall content my felf to notice (till I get more Light) That in a Council (a) held 1078. under Pope Gregery the Seventh, by an express Canon, Laicks are discharg'd to possess Tithes, whether they have them from Bichops, or Kings, or any other person; with certification, that the not restoring them to the Church, infers Sacriledge, and the hazard of eternal Damnation. Which is repeated in the general Council of Lateran 1129, under Innocent the Second, Can. 10. Whence I conclude that the feuing of

⁽a) Concil: Roman.

Tithes by, and to Lay-men, is a practice more antient than these Canons.

4. Many alledge the first Infeudation of Tithes proceeded only from Church-men: Of which the Defence of the Church from being a prey to Infidels was sometimes the One-rous Cause. They tell us also, that Tithes have been sometimes seued only to oblige and incourage Heretors to bring in and cultivate Novalia: And that Church-men again frequent. ly chus'd to dispone their Tithes, especially such as lay at any great distance, for a certain Duty, rather than undergo the uneasse trouble of seeking them in. But I rather incline to the Opinion of Mr. Selden, (a) who ascribes the Original of Feudal Tithes to Lay, and Clergy-men without distinction.

We may here observe, (without ingagingin the Dispute about the Regale) That Christian Princes, to oppose the barbarous Huns, Goths, and Vandals, carrying all before them in Europe in Justinian's time, were in a manner necessitate to usurp the disposal of the Revenues of the Church, and make Alienations and Grants thereof to their Lay-subjects, in order to endear them to their Service, in maintaining of an expensive War, when Religion and Liberty, Property and all was at the Stake. This was fometimes done in a manner grating and disobliging to the Church. But I find none to much blamed and spoken against in History on that account, as Charles Martel, becaus

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⁽a) Hist: of Tithes, chap. 6. N. 4.

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because he would not make Head against the Moors, when they having subdued Spain, were going to invade France, till once the Clergy resign'd their Tithes to him for payment of his Army; and did not restore them according to his solemn Promise, after GOD had bles'd him with Success and Victory. For which the Clergy have indeavoured to blacken his Memory, by making a Story to pass of a Revelation to St. Eucherius Bishop of Orleance, That Martel was damn'd for robbing the Church: Altho this Eucherius (as Baronius reckons) died fome years before him, and so could see no Visions after his Death. However it is reported, that Pepin Martel's Son would be inter'd with his Face downwards, to expiate his Father's Transgressions. Selden (a) disproves the common Tale of Martel's taking away the Tithes, and giving them to the Laity: Alledging that tho he was a Robber of the Church, he never meddled with the Tithes. Dupleix owns that Prince to have usurped the Tithes, and withal contends that he was less eriminal for not making Restitution, than the Clergy for their Avarice and Ingratitude to fo generous a Protector. Others, (b) who go about to excuse the Matter, turn over the blame of the ill consequences of Martel's Usurpation of the Tithes, upon the Avarice and Impiety of his Captains. They alledge that Prince meant no more than only to apply the

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⁽a) Ibid: cap: 5. N. 3. (b) Traite touchant l'origine des dismes, chap: 6. sett. 5.

Fruits of the Tithes for payment of his Souldiers during the War : But that thefe Gentlemen, loath to part with fo fweet a Bit, indeavoured to perpetuate the Injoyment to their Families: Notwithstanding all indeavours of Carloman

and Pepin to the contrary.

6. Pepin, for that he could not get the Church altogether reponed to their former Right, because of Intestine Wars: He oblig'd the Laick possessors of Ecclesiastick Benefices to take Leases or precarious Feus of them from Church-men for payment of both Ninths and Tenths, or double Tithes; and with all to be at the Expense of repairing the Churches. (a) Wherein he was followed by Charles the Great, who ratified the Obligement to pay that double Tithe of a Ninth and Tenth: But put it in the Option of the Ecclesiasticks to renewthe Leafes or not; and ordained those Laick Beneficiaries called Medietarii from their dividing the Rents with the Church, and getting half of the Fruits for cultivating a piece of Church Land, to pay the Tithe of their own proportion to their proper Minister. Charles the Great having conquered much of Germany, he fettled Episcopal Sees there, and indowed them with vast Revenues. Particularly he appointed a Tithe to be payed out of all his own Revenue, and out of all Forefaultures. (b) And I find mention in some of our old Chartularies of the second Tithes of the Casuali-

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⁽a) Thomassin la displine de l' Eglise, part 3. lib: 3. c'ap: 2. N. 6. (b) Anno 789. C. 17. ties

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cheats, and Un-laws of Courts. That Great Prince did by another Law (a) appropriate

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7. But tho Charles the Great made many Laws for the payment of Tithes, which are extant in his Capitulars. Yet in after Ages Princes and others dispos'd of their Tithes as they pleas'd; and commonly to Nunneries and Monastries: Thinking that a Corporation of Prayers would be more effectual than the Devotion of a fingle Prieft, to draw down Mercies and Bleffings upon the Benefactor. Our Kings and great Men did appropriate Churches with their Tithes, not only to Monastries but even to Bishopricks; and for maintaining the Fabrick of Cathedrals, and of Wax-candles therein. Many Rights of Tithes in Favours also of Lay-men are to be seen in the Chartularies of Abbacies.

8. The Clergy hath us'd mighty Endeavours to get the Tithes out of Lay-hands; Nor have frequent Bulls from Rome been wanting for that effect. And for incouraging all Men to give Liberally to the Church; and withal, to remove any Objection that might arise from Church-mens dilapidating or giving away the Church-revenues, many Canonical Decrees were made against conveyances of Tithes to Laymen. But the first effectual Law that came from Rome, for hindring them to pass from hand to hand in common Commerce, was the

⁽a) Anzo 804. C. 3.

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famous Canon Probibemus 19. Extr. de decimis, made in the Council of Lateran, under Alexander the Third in the year 1179. Whereby Laicks with-holding Tithes on the peril of their Souls, are discharged to make them over to Lay-men, and the Receiver that does not restore them to the Church, is not to have Christian Burial.

9. Our Law has fo far gone in with the Canons, That Tithes (which we call the proper patrimony of the Church, (a) and Spirituality of Benefices) could not fince the Lateran Council be set in few, or long Tack, before King Charles's Decreet Arbitral upon the Surrender: And therefore were not annex'd to the Crown by the 29 Act, II Parl. Ja. 6th. But left with the Church as formerly. I confels the 189 Act of that same Kings 13 Parl. bears, The Teinds of the Lordship of Dumfermling to be annex'd to the Crown, according to the Tenor of the Act of Annexation 1587, whereby all the Teinds of the Remanent Kirk-lands and Prelacies of the Kingdom are annex'd. But that Clause is not Authentick, and feems (as Sir George Mackenzie thinks) (b) to have been infert through mistake, contary to the Design of the Act.

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⁽a) Ast 10. Parl: 1. Ja. 6. (b) Observ: on the 29. Att 11. Parl: Ja: 6. N. 7.

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fustained in our Law, as an Exception without the Verge of the Canons prohibition. Because these are presum'd to have been seued
out by Church-men as Proprietars of both
Stock and Teind, before the Lateran Council.
But yet by the general Act of Annexation
1587, where Lands are seued cum decimis incluss, and a joynt Duty pay'd for Stock and
Teind; The Tituals or Church-man is to have
the Tenth thereof, and the King the other
nine parts, with the intire Superiority.

II. The Teinds were not annex'd to the Crown with the Temporality of Benefices : ver after the Thirds were found an ineffectual provion for the whole Ministry: The King was frequently importun'd and prevail'd with to erect them into Parsonages, and give the Patronage to some Erection-Lord, who ordinarly got Tacks of the Teinds from the Ministers they presented. Commissions of Parlament were also named from time to time for planting of Churches, and modifying Stipends out of the Teinds: And the first of that kind appointed by the 2 Act, 22 Parl. Ja. 6. with power to call before them all Patrons, Tacks-men of Teinds, and other pretenders hereto; and to examine their Titles, andafign out of the Teinds of every Parish to their Ministers, being uncompetently provided, perperual Local-stipends, not under five Chalters of Victual, or 500 Merks, where the ruits of the Benefice might affor'd it; nor bove 1000 Merks or 10 Chalders of Victual; eside Manse and Glebe. And to recompence perions

persons lesed therein, by prorogation of their Tacks, or otherways, as they, the Commission. oners thought fit. They were also authoriz'd to unite or disunite Churches when that should be found convenient. But not to meddle with any Ministers already secured in 500 Merks, or five Chalders of Victual, or more of Stipend, tho exceeding the foresaid highest Quantity of 1000 Merks, or ten Chalders. That Commission expiring at Lamba/s 1618. while many Churches remained unprovided of futable Stipends, and Incouragement for Ministers: Another was appointed in the year 1621, much in the Terms of the former; with farther powers to erect and provide new Churches, transplant others to more commodious Situations, and modifie Stipends without being stinted to a determined Quota. But not to alter or meddle with any Church lettled by the former Commission. (a)

the Throne, being sensible of the great addition that might have been made to the Crown Revenue, by the suppressing of Popish Benefices, had not his Father rashly gifted them away: He in the year 1625, the first of his Reign, strongly attacked the Erections with a Revocation the most ample that ever was made, of all Deeds done in prejudice of the Crown, particularly of all Erections of Church-lands, Teinds, Patronages, and Acts of Parliament ratifying the same. Erections were

(a) At 5. Parl, 23-74.6.

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granted both before and after the Act of These granted before pro-Annexation. ceeded upon the Dimission and Resignation of the Ecclefiaftick Titulars, and were quarrelled upon the following Grounds of Nullity. 1. These Titulars being naked Liferenters, had no power to refign, and Refignations in favorem were null; As also, all Rights to Prelacies, before they fell vacant, by the Pofsessors decease, Forfeiture or simple Dimission. 2. The King being only Patron and not Superior, had no power to to accept fuch Refignations, but only to present a new Titular. And as his Majestie could not sede vacante have erected these Benefices directly into Temporal Lordships, quia sede vacante nibil innovandum; neither could that be done indirectly upon the Titular's Resignation. 2. Alienations or Rights of Benefices by Church-men to the enorm Lesion of their Successors, or whereby the Benefice is put in a worfe State than at the Titular's Entry, are null. 4. All Lands unjustly taken from the Church should be restored, and the King by his Coronation-Oath was bound to maintain the Rights and Liberties on't. 5. The Thirds of all Benefices were to have been imployed for Ministers Stipends, till the Church came to the full poflession of their proper Patrimony the Tithes. Erections granted after the Act of Annexation were impugn'd, particularly upon this Topick, That the annex'd Property could not be dife poned without a previous Dissolution in Parhament; And his Majeltie might reduce Alie-R 2 nations diois

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nations made by his Predecessors to the Enorm Lesion of the Crown; Kings in that case
being always considered as Minors, and the
Parliament in place of Tutors to them. The
Royal Revocation is sometimes emitted by
way of Proclamation, and the Parliament ratisses it; (a) Sometimes by way of Instrument,
(b) But ordinarly it passes first under the Privy Seal, and then is consirm'd in Parliament;
after which manner this Revocation was ex-

pede. (c)

12. This Revocation made a great noise, and was thought to have been partly the Oce casion of the Troubles that followed in that Prince's Reign. All the Possessors of Tithes and Church-lands grudg'd at it; the Earls of Kinnoul, Marr, Melrofs Roxburgh, and Mortoun, declar'd openly against it; the Earls of Huntly, Marshal, and Nithsdale, were for it. His Majesty called up the diffenting Lords to a Conference at London, where he told them that a Revocation was not a Novelty, but competent to him Jure Regni, according to the antient Law and Custom of his Kingdom of Scotland; that no prejudice was intended thereby to any person in patrimonialibus fundis; that publick Interest required to pass from Church-revenues, and other Mens Tithes; that every one should have the buying of their own Tithes; and that Vaffals of Courch-lands should hold of the The Nobility answered unanimously that Revocations were a Grievance to the Na-

⁽a) Att 51: Parl: 4: 7: 4. (b) Att 70. Parl: 6. Ja. 5. (c) Att 9. Parl: 1633.

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tion, and had of a long time gone in defue? tude; That his Majesties Father, &c. having bestowed on them and their Predecessors Monastries and Tithes, when there was no Money to reward their good Services, these cou'd not in Law be taken from them without Compenlation. Some days were spent in the Debate. But the King persisting in his Resolve to have them either to part with their Rights to other Mens Tithes, for a reasonable price to be pay'd by the Heretors, and to refign their Superiorities of Church-lands, refering themselves to his Royal Bounty for a Recompence; Or else they should have a Tryal at Law for it: Thele Peers thought fit to gratifie his Majesty

by a Complyance as to their part.

14. The King being afterwards inform'd, That others were unwilling to go into his Terms, and refolv'd not so easily to drop their Rights and Pretenfions: A Summonds of Reduction and Improbation was rais'd in August 1526, upon the Revocation. Those who found themselves concerned therein, gave Commission to the Earls of Rothes and Lithgow, to go up with an Address to the King, and lay the Grievance and hardship of the Case before him. It was no sooner noised at London, that they were putting forward to deliver the Message; but the King's Letters came to stop them from proceeding in their intended Journey. Which they receiv'd as they were upon the Spur at Stamford, and obeyed, by tarrying there till farder Orders. The Petition was fent up to Sir William Alexander of Menstrey, R . 3 then

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then Secretary of State, and afterwards Earl of Stirling, by whom it was presented to the King. His Majesty disrelishing it, as of Strain too high for Subjects and Petitioners, forbad them to fee his Face. But being pacified in a little time by the Interpolition of the Secreta. ry, and the Earl of Monteith: They obtained leave to come up to Court upon acknowledgment of their Error, and were again received into Favour. At their first Audience, the King said (alluding to their Youth) that they had been treated like fo many young Does, whom the old ones, finding themselves holy pursued, and in hazard of being taken, cunningly expose to the Hunter's Fury, to fave their own Carcases. With that he dismiss'd them, and remitted to Secretary Alexander, and the Earl of Monteith, to hear and confer with them upon the Grounds of their Commission. By whom, after frequent meetings, they were brought to approve of the Revocation, with a Quality; To confent that Ministers should have Stipends out of the Teinds of their own Parish; And the King an Annual Pension out of all Teinds; And promifed to use their Interests and Indeavours in Scotland for bringing these things about, according to his Majesties desire.

Compliances, and Resolutions; restricted the Generality of his Revocation to Alienations of the Crown and Ecclesiastick Revenue, made contrary to Law. For Ridding his Subjects of their Fears and Jealousies, and that they might

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not be put to unnecessary Charges, in repairing to Court to Treat with him, he was pleas'd to grant Commission to some of the Nobility, Gentry and Clergy to deal with those who had any Right to Church Lands, Teinds, Patronages, and others falling within the compass of the Revocation, concerning what should be done and given by, and to them; and to make Acts thereupon, which his Majesty promised in Verbo Principis to Ratisse and Approve in the first Parliament; But not to conclude finally in any point, without previously

acquainting his Majesty therewith.

16. The faid Commission (to which James Primrose, and fames Law were appointed sole Clerks) conveen'd and fate at Edinburgh from January to the last day of June 1627. During which time, they made a confiderable progress in the business committed to their care. They ordained a constant Annuity to be paid to the King out of all Teinds, except those belonging to Bishops, Ministers, Colledges, Hospitals, and other pious Ules; that is Six Merks of every Hundred of Teind payable in Money; and out of every Teind Boll of the best Wheat. Ten Shilling; of the best Bear, Eight Shilling; of Oats, Meal, Peafe, and Rye, Six shilling; and where Oats will not render above half Meal, Three Shilling. And where the Victual was of inferior Goodness, his Majesties Annuity to be modified proportionally (a) Where there is no Valuation, they appointed

⁽a) May 29: 1627.

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the Annuity to be uplifted according to the fifth part of the current Rent. (a) These Ads were Ratissed in Parliament. (b)

17. The Kings Annuity, not being annex'd to the Crown, was dispon'd by the King to Fames Livingstoun one of his Bed Chamber, in Security and Satisfaction of 10000 Pounds Ster. ling; which he Transacted with the Earl of But that Right having taken little Loudoun. Effect during the Troubles; The Earl, at the Reftoration, got a Commission from King Charles 2, to fell every Man his own Annuity, and to compone for bygones; and to value Tithes, that the Annuity might be known. Who was to dispone with consent of two of the Lords of Exchequer, and the Disposition to be Registrate in their Books, for instructing what was received. Many bought their Annuities by vertue of that Commission, which was renewed in favours of Fames Earl of Loudoun after his Fathers Death. He proceeded therein, till a Stop came from the King in the Year 1674, with a Proclamation discharging all Annuity preceeding the Year 1660: And fince then, we have heard no more on't.

18. Having sufficiently spoken to what sollowed on the Act of Commission, in relation to the Kings Annuity: I shall shortly relate what more they did, in pursuance of the Trust committed to them. They referred the Composition to be paid for the Feu Duties and other constant Rent of Superiority to the

⁽a) March 23: 1631. (b) Act 15: Parl: 1: Ch: 1. King,

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King, (a) and found, that all Superiorities of Erections should be resign'd to his Majesty street. (b) The Teinds pertaining to the City of Edinburgh, were by the Kings Letter ordained to continue in the same State they were in before the Revocation, which was

Ratified by the Commission. (c)

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19. The Parties concerned having acquiest'd in the Determinations of the Commission; That all Matters of Difference might be the more calmly and speedily adjusted; Four Submissions to the King were successively drawn. One by the most of the Lords of Erection, Titulars, Tacksmen, and others having or pretending Right to the Temporality or Spirituality of Benefices, and the Heretors desiring to buy their own Teinds, containing a Procuratory of Refignation in the Kings Hands, ad perpetuam remanentiam, of their Rights to Superiorities; referring to his Majesty the Composition to be given to them for the Feu Duties and other constant Rent thereof: And for refigning their Rights to Teinds, except the Teinds of their own Lands; referring to his Majesty to determine the Rate and Quantity of the Teinds submitted.

20. None, with less reason, conceived greater Fears of the Kings Revocation than the Bishops. Who therefore sent up Adam Ballenden Bishop of Dumblane, and Mr. John Maxwel one of the Ministers of Edinburgh, to represent to his Majesty their Apprehensions, that the Com-

mission

⁽²⁾ May 29: 1627. (b) June 29. 1627. (c) Novem-

mission of Surrenders would undo the Church They cou'd not be satisfied, how the Teinds that, in the Act of Annexation, were particular larly referved as the Patrimony of the Church, should be fold and disponed to the Hererors. Whereupon the King endeavoured to clear them in the matter, by a Letter explaining the Commission, and his own good Intentions to have Churches Supply'd, that were not already fufficiently provided; the Crown Revenue increas'd; and to give every Heretor his own Tithes upon reasonable Terms Withal he chid them for their want of Charis ty, and groundless Fears. The Bishops and the rest of the Clergy finding the King bent upon the thing, were at length induc'd to make a Submission of all their Teinds, whereof they were not then in Possession, by drawi ing the Teind, or uplifting Rental Bolls; leaving the Herecors, who were lyable in thefe Teinds, to Submit themselves as to the Kings Annuity.

fubscribe the first General Submission, upon pretence, that the Bishops and Clergy had not done it: They, after the Bishops Example, subscribed a third separate Submission of all their Rights to other Mens Teinds.

22. The Commissioners of the Royal Burrows made a fourth Submission, in Name of their feveral Burghs, of all their Rights to Teinds.

Matters submitted the more equally, and with

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the less Expense to the Subject; Warrand was given to the Commission to appoint Subcommissioners in each Presby ry, to be chosen by the Moderator and Brethren thereof, for trying the real worth of Lands in Stock and Teind, and the just and constant value of Teinds, where the same had been drawn by a Titular or Tacksman, not being Heretor for seven Years of fifteen preceeding the fecond of February 1629. Before whom Actions were pursued at the Instance of the Heretors. or Procurator Fiscal, in case of their neglect. Appeals from them were discuss'd, and their Reports allowed or disallowed, only by the Commission. But Heretors having deponed upon the value of their Teinds before the Sub-commission, were not bound to give their Oath again upon the matter before the Commission. The Procedure of the Sub-commissioners (as that of the Judices Pedanei among the Romans) was regulated by a Formula of Injunctions. Five of 'em were a Quorum: they cou'd not admit Witnesses not worth 100 Pound of free Gear; nor more than 10 for each Room; When either the Pursuer or Defender was to make use of the Tenent or Servant of his adverse Party as a Witness, the Master was bound to produce him; In a conjunct Probation, they were to lay most weight upon the clearest Depositions, without respect to the Number; Depositions behov'd to be subscrib'd by the plurality of the Sub-commisfion, and the Clerk; Citations within the Presbytry were to be upon Ten Days, and

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without it upon Twenty, and upon Sixty, if the Party was out of the Kingdom. Such as had Interest to compear before the Sub-commission, were safe from personal Diligence, for Eight Days before, and as long after the Diet of their Compearance. Fourty Years payment of Rental Bolls was a standing Rule, where no body oppos'd it. The Clerk and Procurator Fiscals Wages were paid out of the Kings

Annuity.

24. The King, after the Lights he got from the Proceedings of the Commission and Subcommission, being well and ripely advised in the Matters submitted : Upon the 2. of Septem. ber 1629. pronounc'd four distina Decreets The Decreet upon the first and general Surrender modified 1000 in Satisfaction of each 100 Merks of Feu Duty, or 100 Merks worth of all other constant Rents of Superiority, not being naked Service of Vaffals: Deducing off the faids Feu Duties and other constant Rent, the Blench Duties contained in the Infefements of Erection, for which no Ac. knowledgment was to be paid. And these Feu Duties, and other constant Rent to be retained by the Submitters, till his Majesty make payment to them of the faid Sums; determined the Teind to be the fifth part of the constant Rent, where the same is valued joyntly, with the Stock, and that where these are let for distinct Duties, the Heretor should get Deduction of a fifth part of the true Rent of his Teind; (hence called, The Kings Ease) and allowed the Teinds, when valued, to be bought

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bought at Nine Years Purchase, where the Seller has the Heretable Right; and if but a Temporary one, the price to be rul'd by the Number of Years to run, or Quality of the Right. And referr'd to the Commissioners of Valuation to give down of the ordinary price to Heretors having already standing Tacks or other Rights of their own Teinds, according to the Nature and Duration thereof. The Submitters, for making the thing effectu. al, were ordained to grant and fubscribe Rights to the Teinds of other Mens Lands belonging to them in favours of his Majesty; but only to be lyable in Warrandice from Deeds done by themselves, or their Predecessors whom they represented as Heirs; nor were they to warrand from their own Deeds in favours of any present Possessor of the Tiends. condescended on by them to the Kings Advocat, or the Commission Clerk. The Submission was not to prejudge the Surrenderers in the least, as to any Action of Warrandice competent to them against their Authors; they allowing, in the first end thereof, what they shall receive by vertue of the Decreet Arbitrai Deduction of a fifth part of what is proven to be the yearly value of the Teinds, when the Stock and they are separatly set, is allowed for adjusting the same to the constant Rent Communibus Annis: For the Popish Ciergy had generally racked their Teind, that was fer in Tack for valued Duty or Rental Bolls. (a)

⁽a) Stair Inftit; Lib: 2: Tit: 8: \$ 14.

This Decreet narrates, that the King had a special Interest in the Tithes of Erected Bene. fices; and therefore a part of the price. or valued Dury, should be apply'd to his Majesties Ule.

25. Upon the second Surrender made by the Clergy, and the fourth for the Burrows; The King gave his Decreet in the same Terms with the former, in so far as concerned the Quota, without any mention of a price in order to buying. And the second Decreet doth farther, make it unlawful to the Submitters and their Successors in Office, to fer Tacks, or make any other Disposition of their Submitted Teinds, except for payment of the Quota determined in the Decreet; which should be transmitted entire in quantity and quality to their Successors, without any alteration or diminucion.

26. The Decreet upon the third Submission runs in the same strain, with that pronounced upon the first general Submission, as to the

Quantity and Price of the Teind.

27. The feveral Clauses in the above-mentioned Decreets concerning Church-Superiorities, and the valuing and buying of Teinds, with the relative Acts of Commission, were Ratified in the Parliament 1623, where King Charles the first fat in Person. concerning the Superiorities by the 14 Ad, and the others, touching the Rate and Price of Teinds by the 17 Act of that Parliament.

28. For making the Decreets Arbitral, and Acts of Parliament Ratifying the same Effec. tual ;

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ual; a new Commission was named, (a) o value and fell Teinds in the Terms foresaid. nd to value Vicarage and Parsonage sepaately, where they are distinct Benefices. with power to appoint Sub-Commissioners within Parishes, or Presbytries for valuation of Teinds; to Rectify unequal Valuations, out not those lawfully led against all Parties laving Interest, and allowed by former Commissions upon pretence of enorm lesion, at the Instance of the Minister not being Titus ar, or of the King's Advocat for his Majeffies Annuity, except Collusion is instructed betwixt the Titular and Heretor, or betwixt the Procurator-fiscal and them; and Valuations a Third down of the true Rent were to be interpret Collusion, and the Diminution probable by the Parties Oath. The faid Commission was likewise impowered to Modify Stipends for Ministers out of the valued Teind Duty of their Parishes not under eight Chalders of Victual, or 800 Merks, except for just Reasons; to Divide, Unite, and Annex Parishes; and to perfect the Act of Parliament, Annexing the Superiorities of Church-Lands to the Crown.

29. Besides the Acts of Parliament and Commission made in the year 1633, for the maintenance and provision of the Ministry; and for preventing and settling of Differences betwixt Titulars, and others having Right to other Mens Teinds, and the Hee

⁽a) Al 19. Parl. 1633.

retors concerning the Leading and drawing of 'em: fince that time diverse others have been made to that same purpose. Albeit the Parliaments from the year 1640 to the 1661. were Rescinded by the 14th and 9th Alls. Parl. 1. Seß. 1. Cb. 2. And declared to have Aced without lawful Authority : yet their Decreets of Commission for Plantation of Churches, to the incouraging of Ministers were Ratified; and only made reduceable by the Commission given in that Parliament upon Grounds of iniquity. (a) But from this Ratification, all Decreets of Valuation or Modification fince the year 1637, to the prejudice of Bishops, as to what they then posfess'd were excepted. (b) For the 30 All Parl. 1641, had Ordained all Bishops Teinds, whether Parlonage or Vicarage, to be apply'd by the Commission towards the maintenance of the Ministry, and of Universities, Schools and Colledges, and to other pious Uses; and during the last Presbyterian Government, much of 'em was dispos'd that way: All which Deeds and Grants were Rescinded by the Act 1662, Restoring Bishops. But now Prelacy being again supprest; the Bishops Teinds are come in her Majesties hands.

by former Commissions, to a certain time of two or three years for the buying of their

(a) Alts a and 61. Ibid. (b) Alt 28. Seff. 3. Ibid.

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Teinds. (a) But the Commission 1690. left them at Liberty in that Matter, (b) and was more indulgent to them in feveral other things, than any other former Commission. By allowing all Teinds Indifcriminately to be valued, except either those posses'd by Minifters for their Stipends; (c) Or fuch as belong to her Majesty by the abolishing of Prelacy, while they continue undisponed; or Teinds appropriated to Colledges, Hospitals, or pious Uses; or which have been once confolidat in the Heretors person, who Fened out the Lands without, or referving the Teinds: None of which can be bought, but only valued. (d) Heretors injoyed this farther Priviledge by the foresaid Commission, That (whereas in former times, the Heretor durst not move for a Sale of his Teinds, it being in the power of the Patron, Titular or Tacksman having Right to the Teinds, defeat his Design by offering to allocat them for the Ministers Provision) after a citation given in a Process of Sale, no allocation could be made of the Pursuers Teinds solely, but only of his and the other Teinds in the Parish proportionally. But then the Teind of the Teind-Masters own Land were not to be allocat, except in the case of Penury of Teind beside. (e) when Heretors had obtained

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⁽a) Act 17. Parl. 1633. Act 61. Seff. 1. Act 28. Seff. 3. Parl. 1. Act 15. Seff. 3. Parl. 2. Ch. 2. Act 28. Parl. 1. Ja.7. (b) Act 30. Seff. 2. Parl. W. and M. (c) Ibid. (d) Act 24. Seff. 4. Parl. W. and M. (e) Ibid.

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this check to the Oppression of Teind-Massers: it was thought fit to secure against their Abuse of the Priviledge of leading their own Teinds after a valuation commenc'd. Lest Heretors might industriously enter Actions for Valuation, to get a Warrand for leading their Teinds, and thereafter not insist, but suffer their. Process to ly over, to the great prejudice of those who have Right to the Teinds: It was Ordained, that Warrands granted for leading Teinds upon pretence of depending Valuations, should expire after a Protestation for not insisting is taken out by the Desender.

21. The Commission 1690 continued to fit when King William was Dead, and even after Queen Ann's Accelsion to the Throne. But when King William's Parliament was diffolved, they demurd to meet: as if their powers had expired therewith. Yet the Lords of Session upon a Memorial given in to them by Mr. John Buchan Commission-Clerk, found the faid Commission to be still in Force: Because, 1. The last Words of the Act of Parliament Ordains it to continue till Recalled; which was never done. But on the contrary, the Commissioners did not only take the Oath of Allegiance, and Subscribe the Asurance in that Capacity, but also did sit and Ad under her Majesties Government. Nor can the Commission be understood to Fall by the Parliaments being Dissolv'd: Since the De-

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fign of it, was to Determine Matters in the Intervals of an Adjournment, or Diffolution of Parliament. 2. Tho King Charles 2d died in February 1685, the Commission then flanding, continued to fit and Act as formerly, ill a New One was named by the fucceding Parliament, held by the D. of Queensberry. . The Commission cannot be said to expire. unless either the Act for it had been expresty Temporary, or Rescinded by a posterior Stame, or the Work perfected for which the Commission was erected: neither of which an be pretended. And it is hardly fafe to limite an Act of Parliament, even as to its Induance without a special Warrand of Parliament,

CHAP. IV.

By what Law Tithes are Due:

HE Method I design to pursue in clearing up the Mysterious Subject of Tithes, is, 1. To discuss that more Learned than useful Question, by what Law Tithes are due? 2. To explain the several kinds of lithes. 3. The different Rights of Tithes, their Nature, and how they are acquired, and lost. 4. The Burdens affecting Tithes. 5. How Rights of Tithes are made effectual by Payment. 6. Because Tithes are the common Fond

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Fond of Ministers Provision at the Latter whereof is Modified and Allocat, and the former valued and sold by Decreets of the Commission; and points of Right from thence emerging are determined by the Lords of Session: I shall first treat of Actions before the Commission; and then handle such as fall under the Cognizance of the Lords of Session.

1. The Generality of the Canonists and Clergy, especially the English Divines, are of Opinion, that Tithes; even as to the proportion of a Tenth part are due de jure Divino, To find the first Institution whereof, they run back to Adam, pretending that the Law of Tithes was first given to him; and that Abel was an Honest Payer of Tithes, and Cain was not. They tell us that the Patriarchs, Abraham and Facob payed Tithes by Revelation; the Heathens by Tradition, and the Light of Nature; and that the Fews had a written Command for it. They confess the Ceremonial part in Tithes under the Law, such as the restraining them to one Tribe, and the Modes and Circumstances of Tithing, being peculiar to the Molaick Dispensation was Abolished by CHRIST; but contend that Tithes are moral as to the Quota; and in so far established and approved by our Saviour, and His Apol files. If we Object that the payment of Tithes is no where Commanded in the New Testament. The Answer given is, 1. That was for preventing all occasion of Offence to the Jews whose Priests were then in possession

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of the Tithes; and Matters were fuffered a while to run in the old Channel, till the whole Jewish polity was decently buried. Since the World knew there was a Divine Law for Tithes; our LORD was only to declare who had Right to receive them: Nor was there any necessity to make a new Law about them, fince Christians in these days gave 2. The State of more than a Tenth freely. the Church then under Perfecution, wou'd not admit of a regular payment of Tithes. Farther; for evincing this Divine Right of Tithes, there useth to be adduc'd a swam of Citations and Authorities out of the Councils, and antient Fathers, besides the Decrees of Popes, and Conflitutions of Christian Princes, particularly the Capitulars of Charles the Great, which are the Canons of Councils turn'd into civil Sanctions by the Stamp of Imperial Authority. These jure divino's allow no Substraction in their Decimal Arithmetick; may, cannot be reconciled to the compenfing of Tithes, by payment to the Clergy of a Stipend or any other equivalent: As if that were to be wifer than GOD himself, who required Tithes in their kind, and not in Money; that there might be the greater Sympathy betwixt Pastor and People, by mutual partaking in times of Plenty, and fuftering in Extremities. They pretend not only to give us a Reason why GOD, who requires a Seventh part of our Time, is content with less of our Substance; for that some pains and Industry is bestowed upon the one, and S 3

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Tithes f not upon the other : But also assign mystical the Pari and political Reasons for devoting the Tenth, rather than any other proportion of our Goods. They discover strange Mysteries in the Number Ten, and run out into the Mathemacal Powers of it, with a great deal of fuch like Stuff too irksom to repeat. To give this Opinion the deeper Impression we are intertained with Stories of Persons whom Divine Vengeance purfued for refusing payment of their Tithes. Such as St. Eucherius Vision concerning Charles Martel, the Tragical end of the French Leutardus, and the Tale of Anguffine the Monk, with the Parson of Compton in Oxford Shire. K. Henry 8th of England is brought for an Instance of one whom a Curle followed in the Extinction of his Family, and the melting away of his Treasure, for having meddled with the Tithes. Nay, fome are pleas'd to remit us for a Lesson herein to the very Brutes: For Elian (a) Relates, fay they, that some kind of Beasts in Africa always divided their Prey in Eleven parts, and eat only Ten of 'em, referving the Eleventh as a kind of Tithe. Others are so high upon't, as to tell us that no Argument can be adduc'd against the Morality of Tithing; but what wou'd militate or strick against the Morality of the Sabbath. The time was when this Doctrine had fuch effect upon many, made them fo nicely careful in payment of their Tithes, that at their Death in lieu of any

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⁽²⁾ De Natura animalium L. 4. Cap. 53.

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2. A Learned Divine of our own Countrey, (a) has gone another and shorter way to Work, for maintaining the Churches pretension to the Tithes. These having once been Devoted and set a part for Divine Service, says he, The taking them away, and the applying them to another use, is like what Ananias and Sapphira did with the Price of the Land.

2. The School-men who have fluft Divinity with Distinctions, and many other Divines and Lawyers of no small Note, maintain that some part of our Goods is due by Divine Right toward the Maintenance of the Clergy; but that the Proportion may be Determined by Humane positive Law, according to the Circumstances of Times and Persons. This Opinion is calculated to our Meridian, and jumps with the Analogy of our Law. (b) Nor will it appear unreasonable to any who consider that the Priest-hood being chang'd, there is also a change of the Law. (c) Our Saviour having Institute a New Form of Ministry, appointed also a New Way of providing Necessaries to His Ministers; That is, only in the general terms of They who preach the Gospel- should live by the Gospel,

⁽a) D. Forbes Theolog. Moral. part 3. Lib. 8. Cap. 2. N. 13. (b) Graig Feud. Lib. 1. Dieg. 13. Stair Institut. Lib. 2. Tit. 8. S. 4: Mackenzie Institut; lib. 2. Tit. 10. (c) Hebr. 7. 12.

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and they who Serve at the Altar, should participate of that which is offer'd upon the Altar. 2. Abrabam's payment of Tithes to Melchisedeck, was partly a piece of Homage to him, as King of Salem; partly to Require the seasonable Prefent of Bread and Wine, that Melchisedeck brought with him to Refresh Abraham's Army: and Jacob's Vow was a Free-will-Offering, not founded on any precedent Tie. payment of Tithes by Pagans to their Heathen deities, was not the effect of any Natural Instinet; but only a Custom borrowed from the Lews. And as for the Law, concerning the payment of Tithes among the Jews, that was only calculate to their particular Constitution, being a Theocracy; where the share payed in other Nations to their King, was relerv'd by GOD in a Charter from Heaven to himself, and his immediate Officers, the Priests and Levites, who had not as our Churchmenthe Charge of Souls, but were vafily more numerous, and Judea more fertile than 2. Tithes were clearly Ceremoniour Land. al, not being given to the Levites, till once they had been offer'd a Heave-Offering to the LORD. (a) And only upon the account of the Levitical and Ceremonial Service of the Tabernacle. (b) Which being now intersupred among the Jews, they themselves pay no Tithes, tho they have still Rabbies and Decters of their Law, because they have no Leviles, nor Temple, nor Altar. And then a farther consi-

⁽a) Numb. 18. 24, 28. (b) Ibid. v. 24, 28. deration

deration for bestowing of Tithes upon the Priests and Levites, that holds not in the case of a Golpel-Ministry, was, for that they were excluded from all other part, and Inheritance in the Land. (a) Whereby they loft a Twelfth of Property, for a Tenth of Annual Increase. 4. As for the private Reasonings of Origine, Ambrose, Augustine, and some others of the Fathers, they are of no Auhority, except in fo far as they are founded in Scripture Testimony. Nor is it good Arguing with us to draw certain Conclusions as to the Right of Tithes, from Canons of the Church, or the Constitutions of particular Princes. For what hath a provincial Council of one Nationto do with another? or what Authority can the Imperials of the old French Empire have in Scotland? or what Force can there be in the Popes Decrees with us, who have shaken off the Roman Yoke, but in fo far as they are twisted with our own civil Law? Especially feing by express Statutes, This Kingdom is declared to be Subject only to the King's Laws: & to no Laws of other Countries. (b) Moreover, we and many other Nations contradict the Canon Law in Customs and Practice, touching the Clergies maintenance; and without regard to it, have by municipal Statutes subjected Tithes to civil Titles. Few or no Tithes are payed to the Church in Italy. (c) Only in Venice they pay all their

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⁽a) Ibid. v. 20, 24. (b) Ja. 1. Parl 3. cap. 48. Ja.4. Parl 6. cap. 79. (c) Sir Edward Sandys Europæ speculum Edit. Hag. Com. 1629. pag. 144. Thomassin la Discipline del Eglise part 4. liv. 3. chap. 1. N. 13. personal

personal Tithes when at the point of Death. (a) As few Tithes are payed in Spain. (b) Where most of 'em are Feued to Laymen. We find no mention of Tithes in the Etbiopick Church. (c) Nor in the East Countrey. (d) The Northern Nations were not eafily brought to pay Tithes. Particularly the Danes continued for a long time so averse from it, that they betrayed and murder'd their Prince Knout 4th, for only going about to Impole the payment of Tithes. (e) And we had a Bishop in Orkney, who was Sacrific'd to the Fury of a Mob for his Rigorous exaction of Tithes. The Book of Discipline also 1560, f) Represents it as a thing most reasonable that every one have the disposal of his own Tithes, so be he give satisfaction to the Church of what shall be put upon him. s. In most places where any thing hath been payed in name of Tithe, the Quota hath varied, been sometimes the Eighth, and hath Twelvth, Twenty, Thirty, or any other part according to Municipal Customs. (g) So the Locrians to outdo their Enemies of Crotona did confecrate the Ninth part of their booty to Apollo. (b) The Egyptian Priests had the Third part of the Revenue of that Kingdom. In France by the Laws of Charles the Great, and Lewis

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⁽²⁾ Ibid. (b) Burnet Hist. of the Right of Princes, chap 4.

P. 141. (c) Damian a Goes De Æthiopum moribus. (d) Thomassin. Ibid. (e) Crantz: Dania lib. 4. cap. 37: Meursii Hist. Dan. lib. 4. (f) Head 5. (g) Rebuss de decimis qu. 4. Carpzov. Jurispr. Constit lib. 1. tit. 8. desin. 125.

N. 13. (h) Justin. Hist. lib. 20. chap. 3.

he debonnair two Tithes were payable, that is both a Ninth and a Tenth by the Laick Pofsessors of Ecclesiastick Benefices. (a) In Germany they have a custom of paying Certas mensuras pro Decimis sive Coloni aliquid collegerint five non. (b) By the Laws of Swedland and Gotbland Decimarum Tertiam partem (uscipit Prefbyter, et de reliquis duabus partibus capit Ecclesia tertiam partem. (c) And with us much Tithe is confolidate with the Stock, called Decime incluse; and all other Tithe may be valued: and most of it may be bought. (d) The Divine Right of Tithes being sufficiently confuted : I remit such as defire an Answer, to Doctor Forbes's Argument for leaving them to the Church, to what is advanc'd, Part I. Chap. 5. N. 25.

4. I said, the Clergy according to the Schoolmen and others, have a Title by Divine Right to a Competency of our Goods for their Aliment; But if they be otherways sufficiently provided for, as in Churches where Stipends are modified to Ministers; they have no Divine Warrand to claim any thing by way of Tithe, since the Gospel Reason ceaseth. But the I joyn with those who think that the payment of Tithes may be restricted and qualified by particular Laws and Customs; I would not be understood to favour their Opinion, who hold Tithes to be mere Alms, and not due to the Ministers of the Gospel

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⁽a) Thomassin part 3. liv: 3. chap: 2. N. 3. (b) Selden Hist: of Tithes chap: 7. N. 8. (c) Ibid. (d) Act 30. Parls 1. Sess: 2. W. and M. Act 24. Sess. 4. Ibid.

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by any Parochial-right; but that in case of his Malversation they may be dispos'd of by the Heretor at pleasure. For this is abundantly confuted by the Constitutions and Practice of these Christian States where Tithes have been variously settled, for maintenance of the Evangelical Priest-hood; and other pious Uses, by legal and civil Tithes, which imply a Debitum Justitiæ. So, Mr. Milton is justly censurable for afferting, (a) That the Churches Title to the Tithes, is no better than Gebazi's was to thefe things, which, by abusing his Masters Name, he rook'd from Naaman. Which Expression must be considered only as an Extravagant Flight of an over-heated fatyrical vein.

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CHAP. V.

The several kinds of Tithes Explained.

by these who have handled this Subject, according to the different views they had of it. But I think for distinctions sake, they may be divided into Tithes under the Law, and Tithes under the Gospel.

2. Under the Law, besides the first Fruits, a Tenth was paid to the Levites, and the Tithe of that to the Priests, called Decima De-

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cimarion, or the Tithe of the Tithe. A fecond Tithe was taken out of the Peoples nine parts. and fpent the first two Years at the Temple in Feafts; not unlike the Agapæ of the Primitive Christians. The Rabbins make also mention of the poor Mans Tithe, which every third Year was to be bestowed at home within their own Gates upon the poor and Levites. But whether that was in place of the Tithe for Feasts, as Mr. Selden thinks, or, according to the Opinion of others, a third extraordinary Tithe distinct from both the Levites Tithe and

it; they're wifer than I can tell.

2. Tithes under the Gospel may be consider'd not improperly under the Notion of ordinary and extraordinary Tithes. The latter were an improper kind of Tithes impos'd by the Pope pro re nata to serve a turn of some publick Exigence of Church or State; as for carrying on a Holy War against Infidels or Hereticks. Such were the Decimæ Papales, and the Decima Saladina, Some Grants of Tithes of this kind in favours of our Kings are extant in Fordons History. I find mention in some of our old Papers of Second Tithes; and thefe I think may not improperly be brought under the Denomination of extraordinary Tithes. The Bishops of Aberdeen were infeft in the second Tithes of all Casualities of Ward and Relief of Lands holden of the King within the Shires of Aberdeen and Bamff; and the raising thereof being uneasy and troublesom, B. William Elphinstoun obtained from King James 4. an equivalent Compensation for the same out

but of the Rents of the nearest, and most contiguous of these Lands during the Ward. The Bishop of Brechin also got Right in the Year 1412 to the second Tithes of the Kings Casualities of Ward, Relief, Marriage, Fines, Escheats, and Unlaws of Justice Courts, Chamberlain and Sheriff Courts, in the Shire of Kincardin, &c.

4. Ordinary and proper Tithes are divided either with respect to the Subject Tithable, or the persons payable to. Tithes with respect to the Subject Tithable are commonly divided into Personal, Predial, and mixt Tithes.

c. Personal Tithes arise out of a Mans free Gain by his Trade or personal Industry; Expenses being first deduced: And are due at the Years end to the Parish Church where the perfon lives, and partakes of the Divine Ordinances. (a) But at Venice they have a custom of paying their personal Tithes once for all in Articulo Mortis. (b) Charles the Great is the first whom I observe to have appointed by a publick Law, (c) That all persons should pay the Tithe of their Labour, now called, The Personal Titbe. It were vain for me to trace the Canoniffs in their Subtilizing, when they tell us, that he who has Houses in several Parithes, and refide fometimes in one and fometimes in another, must pay the personal Tithe

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⁽²⁾ Zoes: in Decretal: Lib: 3: Tit: 30: Cap: 1: N: 12: Cap: 3: N: 63. Canis: de Decimis, cap: 2: N: 2. (b) Rebuff: de Decimis, Q: 13: N: 52: A: Monet: Breviar: cum Auct; de Decim: Cap. 7: P; 478, (c) Anno 789; C: 17.

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where his principal Dwelling is: (a) And that if upon the Confines of two Parishes, he pays a personal Tithe to each of 'em. (b) And it it be doubtful what Parish the Parties House belongs to, the Situation of the Door determines the matter. (c) And where there are two Doors, that is confidered as the Parish where the principal or Fore-Door is fix'd. (d) I fay it were fo much Labour thrown away, to infift and dwell upon thefe or the like unprofitable Niceties, which fwell the Writings of the Doctors. Especially fince personal Tithes take no place in our Custom. (e) And more than that have every where gone into Desuetude. (f) But yet 40 Years payment to the Vicar of a certain Duty by Weavers out of each Loom in the Parish, tho akind of personal Tithe was sustained to make them liable for the same in all time thereafter. (g)

6. Real or Predial Tithes are such as are payable out of the natural Fruits or Product of the Ground or Water. (b) Of this kind are the Tithes of Corn, Wine, Fish, and living Creatures, &c. which are due perceptis statim Fruetibus to the Parish Church where the Fruits are gathered; and that off the

whole

⁽a) Rebuff: Ibid: Q: 6: N: 2: Monet: Ibid: Cap: 5: P: 282
(b) Ibid: Rebuff: Ibid: N: 3. (c) Ibid: N: 4. (d) Ibid: N: 5: Arg: l: 44: ff: ae Religios: & l: 10: ff. de Statu Hominum.
(c) Stair Inftit. Lib: 2: Tit: 8: S 6: (i) Carpzov: Jurispr: Consist. Lib: 1: Tit: 8: Def: 131: N: 3: Canist: de Decim: Cap: 2: N: 3. (g) November 29: 1678: Birnie contra E: of Nithsdale and his Tenents. (h) Stair Instit: Lib: 2: Tit: 8: S 5.

whole Head, without any Confideration or Allowance of the Expenses of Reaping or Cultivating. (a) Although this would seem scarce consistent with these Principles of Law, Non intelligentur Fructus nist deductis Expense, (b) Nec Lucrum intelligitur nist omni Damno deducto. (c) The Reason pretended by the Canonists, why, as to the Deduction of Expenses, it is otherwise in Personal than in Predial Tithes; is, because GOD Almighty, in the Old Testament, reserved to himself the one, and not the other. (d)

the common Division, by which they mean such as are payable out of the Industrial Profits of Lands, there seems to be no necessity of admitting the same as contradistinct to the other two. For I find no Ground for it in the Canon Law, which (e) only mentions two sorts of Tithes, Predial and Personal. And if the Concurrence of personal Industry towards the production of Tithable Fruits did afford the Denomination of mixt Tithes; then all Predial Tithes would be such. For removing all Ambiguity of this nature, these ought properly to be termed personal Tithes, that arise from what is gained meerly by personal arise from the common and the first from the common arise from the common a

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sonal Industry; and all others should go under the name of predial or real Tithes, that humane pains or industry doth but partly concur

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8. Tithes, with respect to the persons payable to, are divided into Parsonage and Vicaage Tithes. For understanding this Distinction, it is fit to notice, that the Teind due to he Parish Minister was at first only the Tithe fgrowing Corn. But when Parith Churches ell to be annex'd and appropriated by Mortis cations, or otherwise, to Cathedral and Colegiate Churches and Monastries, and pluraliy of Benefices came in play; the Cure of hele Churches came to be supplied by Vicarncumbents. Whose Stipends, in the begining, were nothing but what the Parsons were leas'd to give. But that proving very inconiderable, a new method was fallen upon to fet off the Tithes of the Annual Increase, Corn acepted, for the Vicars better provision. Hence arose the Difference betwixt Parsonage and Vicarage Tithes. Under Parsonage Tithes. alled Decimæ Garbales, or Teind Sheaves, or he great Teind, I comprehend only the Tithe Corn. Because the true Characteristick of assonage is, that it was introduced by positive aw, and is the same in all places, liable to no Alteration or Extinction by Prescription or ong Custom. Whereas it can be made appear y Decisions not a few, (b) That all other

⁽²⁾ A: Monet; Ibid: P: 169: Barbos: Collect: Doctor: in Lib: Decretal: Tit; 30: pr; N: 11. (b) Vid; inf. Chap: 6: Sect. 5.

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Teindable Subjects in Scotland have been found to be local: And either introduc'd, or modified or taken off by Prescription. It is confest'd that Tithes of another kind than Corn have been sometimes paid to Parsons and to Bishops But these were not payed to them qua Parsons but as having the Title of Vicars consolidate in their person. For as in some places there never was any Vicar: So in others there was but the Parsonage and Vicarage are now swall lowed up in one Titular. If it be objected that fince two Acts of Parliament were made for obliging each Man having a Plough of Eight Oxen to Sow at least a Firlot of Wheat half a Firlot of Peafe, and 40 Beans yearly under the pains of Ten Shilling: (a) It would feem, that Corn in those days could not be confidered as the Subject of the great Teind there being so little Sowing. My Answer is That these Acts do not argue a Scarcity of Corn, but only of some particular Grains for not Sowing whereof, even at this day, fome Country People have their own political Reasons. Parsonage then is the Tithe of Corn, which is due to the Parson. Parsons are they who possess Parochial Benefices by their own immediate Right, whereas the Vicars Title is deriv'd from another. Parsons again are either fuch as we properly call fo, for performing the Sacred Function themselves, the predial Tithes of whose Parish are not appropriate to any other Benefice, but in

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⁽a) Ja: 1: Parl: 5: Cap: 81: J: 2: Parl: 14: C: 81.

their own possession; or Representative Parfons, if I may speak so, who supply the Cure by the help of Vicars. Of this latter kind are the Prelates of Churches and Monastries : So called from the respect and preference they

get in their Chapters and Convents.

9. Vicarage, or the small Tithe which belongs to the Vicar, came in by no positive Law, but only by Custom: (a) And by Cu-flom it is modified, and taken off. The Reafon has been, because Vicars at first called simple Stipendiary Vicars, were only put in for a time to ferve the Cure during the Parfons pleasure; and frequently upon the account of his Infirmity, and perhaps Lazines: So that when the parson found himself in a Condition or Humour to officiat, the Vicar was remov'd, and the Stipend expir'd with his Service. But at length, ob majus bonum Ecclesie. perpetual Vicars were settled with Cura Animarum. In Parishes, according as all or most of the Increase was Corn, the Vicarage was intirely or partly founded in Teind Sheaves. In those where the pasture Ground was more considerable, the Vicarage was the Teind of the product thereof. And as that differ'd in different places: So it afforded a different Vicarage Tithe. In some Parishes no Vicarage is paid, as where most of the Land is laboured, and the proper Subject of Vicarage inconfide rable. In many parts the Tithe of Eggs. Fruit, Lint and Hemp is paid. The Vicarage

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⁽a) Epeiffes des Benefices Ecclesiast; Tit: 10; Sest: 3; N: 6.

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of Salt and a personal Teind Duty for every Loom in the Parish was sustained upon 40 Year possession. (a) Yea, in different places of the same Parish there was found Diversity of Vicarage. In some Lands thereof the Tithe of Lamb and Wool was paid; in others Hay Cheese and Geese was the Vicarage, and in no part of it any Vicarage of Cows. (b) In some Parishes again, and not in others, the Tithe-Fish is claim'd as Vicarage.

into Civil, and Ecclefiastick. By the latter he means such as the Parson or Vicar may lay Claim to, and by the former the Kings Teind of Minerals, and those Teinds that are Feuel with the Stock, now called Decime Incluse.

French King in old time, as the Learned B. of Sarum (c) observes, was the Tenth Part, which came to be called the Ninths after the Church had the Tithes. (d) The same Custom was also received in Germany and other places. It was the Share which the Roman Emperors reserved out of Mines. (e) And Samuel, (f) when he is exposing the Severities of Monarchy, infinuates, that this was also the Claim of the Kings of the East.

12. Decima Incluse are Teinds which have been always within the Memory of Man Feu-

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⁽b) July 7: 1677: Parson of Prestonhaugh contra his Parishinners. (c) Hist: of the Rights of Princes, Chap: 4. (d) Mezeray Hist. (e) 1: 3: Cod: de Metall. (f) I Samuel 8: 15, 16.

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ed promiscuously with the Stock for a joint Duty, and differ from ordinary Teinds in many Priviledges and Specialities. (a) Our Decime Incluse are much the fame with the Decime Infendate in the Canon Law. But all Decime Infeudate are not esteem'd Incluse with us For these are in the common case of other Teinds, if it can be proven, that the Stock and they were once distinct and separate. So in a case betwixt Monimusk and Pitsoddels. (6) Teinds transmitted by Infestment under the Designation of Decima Inclusa, were found not to have the Priviledge of fuch; in regard diffinct Reddendo's were paid for Stock and Teind: Altho a different Duty happens frequently to be paid in Lands of the same Holding.

13. There is another kind of Tithes which are now priviledg'd with us, that they cannot be bought or fold, viz. Those that were once in the person of the Heretor, and reserv'd by him, when he Feued out his Lands. (c)

(a) Vid: inf: Chap: 6: pr. (b) July 13: 1678. (c) W. & M. Parl: Seff: 4: C: 24.

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CHAP. VI.

Of the different Rights of Tithes; their Nature, and how they are acquired, and extinguished.

HE Council of Lateran held under Pope Alexander 3 in the Year 1179 discharged the Feuing out of Tithes in these Terms, Probibemus ne Laici Decimas cum Animarum suarum peri-

culo detinentes; in alios Laicos poffint aliquo modo transferre. Si quis vero receperit, & Ecclesia non reddiderit, Christiana Sepultura privetur. Canonists differ in explaining this Law. Some would have the meaning to be, that Tithes, tho acquired before that Council, are not afterwards to be transmitted from one Layman to another. As if the Canon were only Declaratory of a Eaicks utter Incapacity of enjoying Tithes at any time. (a) Sir G. Mackenzie takes it also in this Sense. (b) And therefor wonders, why our Custom restricts the Effect of the Canonical Sanction to Infeudations fince the Lateran Council; thinking the Mistake lay in concluding that because Laicks, by that Decree, were declared incapable of Feudal Tithes, therefore they

⁽²⁾ Rebuff. de Decimis, Q: 10: N: 23: Barbos: in C: cum Apostolic: 7: N: 5. (b) Observ: on the 29: Act, 11: Parl: J: 6.
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were capable of 'em before. Others more probably think it imports only a Prohibition to grant new Feus of Tithes in favours of Laicks, without prejudice to former Infeudations: And that the Infinuation in the Canon concerning Laymens possessing Tithes before, with the Danger of their Souls, is only to be understood either of such as had made themselves Masters of Tithes without any Shadow of Title; or did not pay their Feu Duty to the Church. (a) And this Opinion is futed to the Analogy of our Law. A third fort labour to amuse us with a Reconciling Distinction of Jus Percipiendi, and Fructus Decimarum; as if the latter, and not the former, might lawfully pass into Lay Hands. But the Learned Thomassin (b) feems to be Non Liquet in the Matter. Graig (c) thinks the Distinction useless as to us, who have no Feus of Tithes extant of a Date anterior to the Lateran Council. From which time, our Law never allowed the Feuing of Tithes, till that Rational Innovation introduced by King Charles the First: Neither would Immemorial Poffession of them as Feudal have made a valid Right.

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2. But sometimes the Churchmen being Proprietars of both Stock and Teind, Feued them out together for a joint Duty. And these we call Decima Inclusa, which none can instruct to have been ever separated from the

Stock.

⁽a) Covarruv. Varior. Resol. Lib. 1. Cap. 17. N. 5. vers. olim sane. Canis. de Decim. Cap. 13. N. 5. Selden Hist. of Tithes, Chap. 6. N. 4. Chap. 7. N. 2. (b) La Discipline del'Eglise, Part. 4. Liv. 3. Chap. 3. N. 7. (c) Feud, Lib. 1. Dieg. 13.

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Stock. Such was the Priviledge of Decima In. clule, that the King himself could not grant new Charters effectually, with that Claufe, (a) They were in fo far confidered as no Teinds. that a Clause in a Charter cum Decimis Inclusis was thought to imply, that Laicks might prescribe a Right to these included Tithes: They could not be valued, nor subjected to any legal Burden of Ministers Stipend, or the like; tho there was not Sufficiency of other Teinds in the Parish. But in regard the 29. Act, 11. Parl. Ja. 6. ordains, that where Stock and Teind are Feued together for a common Duty, Nine Parts thereof belong to the King as Temporality, and the Tenth to the Church as Spirituality, in Contemplation of the Teind: It was found, (b) That an Heretor, notwithstanding his Right cum Decimis Incluses, should be liable to the Minister for the Tenth Part of the Feu Duty, and have Relief against the Titular pro tanto. And yet if a Fieu were granted of Lands and Teinds for payment of a certain Duty, and the Titular or Ecclefiastick having Right to the Superiority should dispone the same, or Nine Parts of the Feu Duty, referving the Tenth to himself; that Tenth could never be understood as Teind To as to be liable to a Stipend, more than the other Nine Parts.

3. Since the Surrender and the Royal Decreets Arbitral, Tithes generally pass in the

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⁽a) Stair Instit. Lib. 2. Tit. 8. § 10. (b) March 1684. Heretors of Tulliallan against colvil.

fame manner as the Stock by Infefrment. And that either to Universal or Singular Successors. Tithes are in Non-entry, as well as Lands from the Death of the Person last Vest and Seased in the Heretable Right of 'em, till his Heir be entered. But fince they were never Retoured, the Non-entry Duty, in the Opinion of Sir Ja. Stuart, (a) thould be the Feu Duty, where the Holding is Feu, and the Fifth of the Retour of the Property, if it be Blench. The Entry of Heirs is expede by Precepts of Clare Constat or by Service upon Brieves out of the Chancellary. And tho these Brieves bear only a Warrand to enquire, de quibus Terris & Annuis Reditibus the Defunct died Vefitus; yet an Heir, by vertue thereof, may be specially Serv'd to one in Tithes: For the Terms of the Brieve are not to be so strictly and captiously observ'd. (b)

4. For understanding how Rights of Tithes are transmitted to Singular Successors: I shall divide them into Legal, and Conventional Rights. Under the former I comprehend, 1. That Right of Tithes, which, by the common Law, belongs to the Parish Minister. 2. Those Tithes given to Patrons in lieu of their abolished Right of Presentation. Convention nal Rights are either Heretable and Absolute, or Temporary. The latter are constitute by Tacks, the other by Disposition or Adjudication: And both by Possession. Of the Members of which Division and Sub-Di-

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⁽a) Notes upon Dirletons Doubts, Title Teinds. (b) Ibid. vision,

vision, we shall treat in so many distinct Sections.

SECTION I.

What Right of Tithes is competent to the Parish Minister?

WE are Commanded to Honour the LORD with our Substance. (a) And fince He in whom all Fulness dwells, standeth not in need of our Goodness Himself, (b) those His more immediate Servants, who ferve at the Altar, and preach the Golpel, are declar'd as His Receivers, to have Right to some part of our Temporal Things, in order to their Maintenance. (c) For this End and Use the Tithe hath gener rally been set a part. And that the Distribu-tion might be more equal: It was found convenient to appropriat to each Minister, the Tithes of his own Parish. Which was confirm'd in that Provincial Council held in Scotland in the year 1225, (d) under Pope Honorius the 2d. (e) By this Method the greater portion of Tithes fell justly to his share, who had the wider Parish, and consequently the more weighty Charge.

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2. Thus,

⁽a) Prov. 3. 9. (b) Psalm 16. 2. (c) 1 Corinth: 9. 11, 12, 13, 14. (d) Cap. 35. (e) Vide Supra cap: 3: Pr: Num: 3d.

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2. Thus, the Parish Minister came to have a presumptive Right, by the common Law, to all the Tithes within his Parish, (a) Even to the Tithes of Novalia. (b) Which Tithe was in a manner Ratified by the 102 Act. Parl. 7. Ja. 6. Ordaining all Benefices under Prelacies, to be provided only in favours of adual Ministers. So that the Parochus qua Minister might have effectually pursued payment, without any farther instruction; unless a better Title were produced by one compearing for his Interest. (c) I don't distinguish with some, betwixt the jus percipiendi, and the Perceptio fructuum : For the first would become an empty and an elufory Right in the Parochus, if to his prejudice, and without his consent, the present Fruits of the Teinds could be safely posses'd by others. The Doctors carry this Presumption of the Parochus, having Right to the Tithes within his own District, so far, that if another were Disposses'd of 'em by him, they don't allow the Party to be fummarly Restored according to the Brocard Spóliatus ante omnia restituendus ; unless he justify his former Possession by proving that he had then a good Right in his person. (d) And although ordinarly the King's Gift be sufficient against any that shew

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⁽a) C. cum contingat 29. C. quoniam 13. X. de Decimis Bruneman, de jure Ecclesiastico lib. 2 cap. 6. n. 11. (b) Ibid n. 9. Canis de decimis cap. 11. n. 1. (c) Rebust de congrua portione n. 10. & sequ. Barbos. de Offic. & potest. Paroch. cap. 28. S. 2. n. 8, & 9. (d) Ibid. n. 43. & seqq. Covarr. var. Resol, lib. 1, cap. 17. n. 6.

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not a better Title; his Majesty being the common Author and Fountain of Rights, yet the same in Favours of one of the Prebends of the Chappel-Royal, and a Decreet conform, with Collation and Institution, was not sustained to carry the Right of Teinds from the Ministers Tacksman, although he produced no other Title but his Tack; unless either 'a Mortification of these Teinds to the Chappel Royal, or Possession were instructed. (a.) Vicarage Teinds as well as Parsonage, de jure communi debentur Parocho, unless Prescrip. tion of Freedom be proven, or a better Right in some other made appear, without necessity upon the Minister to Instruct Possession, but only his prefentation and admission to that Church, with a Decreet conform. (b) And prefentation to a Church which is a Parsonage, doth intitle the Minister to the Teinds, though not presented to be Rector or Parson. So a presentation to a Church that was a Prebendie of the Collegiat Church of Dumbar, and to the Teinds thereof, was sustain'd to give the Minister the same Right, as if he had been expressy presented to be Prebendary. (c) But this presumptive Title of the Minister, was Excluded by a clear Right to the Teinds in the Heretors own Person. (d)

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⁽a) June 27. 1665. Ferguson contra Stuart of Ascog. (b) January 14. 1674 Johnstoun contra Stuart. (c) Dirleton November Decis. 112. Dalzell contra 26 1667. (d) February 4. 1681. Robertson contra Arbuthmet of Carngall. 3.It

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3. It appears from what hath been faid. that regularly all Teinds belong'd to the Incumbent. Who if a Parson, had Right to the Parsonage-Teind, and to the Vicarage if a Vicar: unless he was Limited by a Decreet of Modification or Locality; or that another could shew a better Right. Yea, Discharges to an Heretor of his Tithes by the Minister who was once Titular, after he was turn'd a Stipendiary, was fustained for an Exoneration to the Heretor as to the years payed; and only to make him lyable to the Tackiman, for other years conform to that use of payment, till Citation or Inhibition. (4) But ule of payment to a Minister, having Right by Assignation to the whole Parsonage-Teinds of a Barony, relative and conform to a Decreet of Locality, wherein three Chalders of Victual only was appointed to be payed to him furth thereof, did not Defend the Heretor from being lyable in payment of the Superplus-Teind to the true Titular. (b)

4. Persona & Vicarius were not Nomina juris here, before King David's Reign, as hath been already Observed. (c) But at length our Law came to acknowledge the Parochial Right of Tithes so far, that it was made a Crime to take Tacks of them from others than the Parson, or Vicar, or their Farmers. (d) But now the Parochial Right is refolv'd

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⁽a) 19. January 1669. E. of Athol contra Robertson of Strowan. (b) 24. November 1699. Sir William Bruce a. gainst Sir David Arnot. (c) Chap, 3. Fr. n. 3. (d) Act 7: Parl. 2. 34. 4.

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into a naked Power of retaining Possession of the Benefice, till the Patron obtain a just Stipend legally settled upon him. (a) Which carries me to the other Legal Right of Tithes lately granted in Favours of Patrons.

(a) Act 23. Seff. 2. Par. W. and M.

SECT. II.

What Right to Tithes is competent to Pa-

THE Powers and Priviledges of Patron were formerly very Confiderable: he had the Disposal of the Fruits of the vacant Benefice; and the Presentation of Incumbents, whose Deeds of Importance relating to the Benefice, were not Legal without his Consent. These ordinarly at their Entry used to convey their Parochial Right of the Tithes by way of Tack to the Patron for modifyed Stipends far within the Value: and what Remained over the modifyed Stipend, was so much clear Gain to him.

2. But now Presentations are Rescinded, in lieu whereof Patrons have got Right by Law, to all the Teinds of their Benefices, not Heretably Disponed, with the burden of Tacks, and the ordinary Impositions for Ministers Provisions and Augmentations; even of Maintenance to two Ministers in one Parish

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rish, if the Commission please: and Redeem? able by the Heretors at fix years Purchale after Valuation. But the Minister benefic'd is not to be Disposses'd until the Patron obtain a just Stipend legally settled upon him. (a) So that the old Brocard Decima debentur Parocho, is in a manner inverted to the Tune of Decime debentur Patrono. By the Act of Parliament 1593, (b) Gifts of Patronage from the King, without Consent of the Benefic'd Person, are Declar'd Null. But now by the Ads of Parliament 1690, and 1692, all Ministers are made Stipendaries, and the Teinds of the Benefice expresly stated in the Patron; with the burden of a Stipend to the Minister. Who though once a Titular is allowed, but a jus retentionis et bypothecæ, till Redeemd by the Patron: Not unlike the Lords of Erection their Title to the Feu-duties. For as thefe cannot of themselves pursue Reduction of their Vassals Feus: So Process was not sustain'd at the Instance of a Quondam Parson for reducing the Kings Gift of Patronage upon the Act 1593, as being Null for want of his the Incumbents consent. (c) The Minister of Hounam being provided by a Decreet of Locality with a Stipend, partly out of the Parsonage, and partly out of the Vicarage-Tithes of his Parish; and Sir John Scot of Ancrum having purfued a Valuation of the Vicarage as

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⁽a) Act 23: Sess: 2. Junct Act 26: Sess: 4: Parl: W and M: (b) Act 172: Par: 13: Ja: 6. (c) The Minister of Askirk against Sir Gilbert Eliot.

gainst Sir Walter Riddel of that Ilk, and the o ther Heretors, to the Effect he as Patron might have the Excresce, after deduction of what was payed to the Minister: The Lords of Commission found that he was not in the case of the Act of Parliament. Since the Mi. nisters whole Stipend was not payable out of the Vicarage-Teinds, and they were not fut. ficient to make it up. Teind fich taken in alto mari were found Valuable, and lyable to be fold at the Instance of the Heretor of the Ground where the Boats landed, against the Patron of the Parish, who laid Claim to them by vertue of the faid late A&. (a) For the Patrons Right to the Teinds, and the Heretors Right to buy them at fix years Purchase, are reciprocal, and of the like extent. A Dispofition by a Patron to an Heretor of a Tack of his own Tithes, with all other Right he had thereto, or might have at any time thereafter; was found to carry, not only Tacks of Tithes and conventional Rights, but also the Benefite of the Supervenient Act of Parliament 1690. (b) In the case of Lands altogether Dismembred from one Parish, and Annex'd to another; the Patron of the latter will no doubt have Right to the free Tithes of the Lands Annex'd. But if the Annexation on be only quoad curam animarum; and the

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⁽a) 22 July 1702, Sir James Hall of Dunglass against the Moderator of the Presbytrie of Dumbar, Lord Alexander Hay, or. (b) 3: December 1698, Laird of Allardyce against the Vifcount of Arbuthnet;

Heretors of the Annex'd Lands continue to pay Stipend out of their Tithes, to the Minister of the former Parish: It would seem that the Patron thereof may pretend to the Superplus-Tithes of the Dismembred Lands.

SECT. III.

Of Heretable and Absolute Rights of I ithes.

TITHES, although they be distinct Rights from Lands, are either alienated exprefly; or tacitely by Prefumptions and Inferences. Teinds are tacitely alienated and conveyed under a Wifes provision to the Terce of all Lands and Heretages. (a) But a Husband having Obliged himself to Infeft his Wife in all Lands and Heretages Conquest during the Marriage; her Right was found not to Extend to Lands and Teinds, whereof the Husband purchased an Absolute and Heretable Right, two years after he had acquired Tacks of the same stante Matrimonio : Except in so far as the yearly Profite by the Heretable Right exceeded that of the Tack. (b) Teinds were found to be carried by a Dispofition of Lands, not mentioning the Teinds: because it contained an Affignation to the

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⁽a) 13: February 1628: Lady Dumfermling contra the Earl her Son. (b) 12: March 1628: Inter Eosdem.

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Tenents Tacks, which bore a Joint-duty for Stock and Teind, and an Obligement to pay the Ministers Stipend out of the Teind. A Buyer or Compriser from one having Right to Lands cum decimis inclusis, will have Right to the Teinds, though not expresly mena tioned in the Disposition or Comprysing: But this would not hold in the case of common Teinds. For although Servitudes and Rights of Annualrent, and other Burdens upon Lands are Extinguished confusione or consolidatione. as foon as they come in the person of the Heretor: Yet by one's acquiring Right to the Teinds of his own Lands, they are not fo confounded with the Stock, as that the Lands being thereafter Dispon'd or Compres'd. without mention of the Teinds; the Buyer or Compryser should have Right to these. For where Lands and Teinds are Possessed diverso jure, the Latter are not of the Nature of a Servitude.

2. A Disposition of Teinds for Onerous Causes to a Creditor, to be bruiked by him till he was compleatly payed of a Debt therein condescended on and specified, conform to which he attain'd possession of the Teinds, by receiving payment, and granting Subaltern Rights thereof, was not found a modus babilis of Conveyance, or a sufficient Title to maintain the Creditor in his possession against a singular Successor; Or to defend him in a Spuilzie after Inhibition: But only a personal Security

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⁽²⁾ February 27: 1672: Scot contra Muirhead.

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against the Granter. The Right not being fet by way of Tack for a certain and definite time, or otherwise to make it real. (a) When Tithes are conveyed with all Title the Difponer hath, had, or shall acquire thereto; Supervenient Rights acquired either by Staute or private Transaction accrescunt successori. (b) Warrandice or an Obligement to make up the Subject disponed in case of Eviction, is a common Clause in Dispositions, sometimes exprest; and sometimes implied, as when the Right is granted for an Onerous Cause. either of which Cases, if the Disposition import an absolute Right, the Disponer cannot cloth himself with any posterior Title that would infer absolute Warrandice against him, if in the person of another. Because jus superveniens authori, doth acresce to his singular Successor; even when the Right granted by the Author is reduc'd before acquiring of the other. But if only a particular Right be difponed, or any Right the Disponer hath at the time; He the Disponer, may make use of an after acquired Right to elide the former. And if he then dispone the posterior Right to a third Party for an Onerous Cause, that fingular Successor may exclude him to whom the first Disposition was made, albeit it contain Warrandice from the common Author's Fact and Deed. (c) Warrandice is never exten-

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⁽a) March 27. 1628. Lord Blantyre contra Parishioners of Bothwel. (b) December 3. 1698. the Laird of Altardice a- sainst the Viscount of Arbuthnet. (c) July 19, 1664. Dow- slass contra L, of Wedderburn.

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ded to Distress or Eviction by Subsequent Sta tutes, of which Purchassers must take their hazard. (a) Therefore no Process was sustain ned upon a Clause of Warrandice in a Dispo sition of Teinds, for relief of a posterior Impo. fition of Stipend to a Minister. (b) But a person being provided to a certain quantity of yearly Rent out of the Teindsof some Lands, which were afterwards appointed by Law to be the Subject of a Stipend; The Granter of the Annuity was found lyable to make up the De-

ficiency of the Fund. (c)

2. An Obligement to dispone is in several Cases esteemed equivalent to a Disposition. But yet an Obligement to dispone Tithes for a certain price contain'd in a mutual Contrad. was found not to carry the Right to the Tithes in favours of a fingular Successor; unless he would either pay the price, or prove it to be payed; notwithstanding of Fourty years possession by vertue of the Contract. (d) Because an Obligement to dispone is no Dispofition, nor can make a Title for Prescription more than a Bond to grant a Charter and Seafine can supply these: The same being neither a Decreet nor a compleat Right. And farther, whoever founds upon a mutual Contract, either by way of Action or Exception, must fay that

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⁽a) July 12. 1667. Watson contra Law. July 1. 1676 L of Auchintoul contra L. of Innes. (b) March 27. 1634 Lady Dumfermling contra the Earl her Son. (c) July 28 1635. Lady Cardross contra Lord Cardross her Son. 19 Jun 1697. Hume of Linthil against Hume of Wedderburn (d) February 9. 1704. Earl of Galloway against Mackguffock of Rusco.

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he Counter-part of it is fatisfied. But payment of the price in this Case being instructed the Party in whose favours the Obligement odispone is conceived, might exclude the Granter, or any reprefenting him upon the common ground of frustra petis quod mox es relituturus. It was alledg'd for the person having Right to the Obligement to dispone. That he, as a fingular Successor, was not bound for the price, that being his Authors Debt. 2. The party obliged to dispone asfign'd the price, and the Affigney purfued for ir, which argues that the Cedent look'd upon himself as denuded of the Right of the Tithes. 1. The Obligement to pay the price was prescrived; And Prescription hath the same effeet as payment. 4. If the Obligement to dispone had been contraveen'd by the Granters denuding himself of the Teinds in favours of another, the Contract cloth'd with possession would have excluded that other: And he could not have founded upon the not payment of the price, as being jus tertii to him. But all these Defences were repell'd. Because, I. Qui agit ex contractu, debet prius implere contractum. 2. It is not to the purpose, that the price was affign'd and purfued for. For whoever fells by way of Contract has two Remedies, viz. Either they can pursue for theprice, or recover the thing it felf by vertue of their own Title, unless the other Party can make appear that the price is payed, or Security accepted for it. 2. One Parties Obligement in a mutual Contract cannot prescrive, while the U 3 other

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other doth stand. For as an Exception cannot prescribe, so long as the Action is current: So neither can a Reply, so long as the Exception is competent. The power of disponing and interest to receive the price, as well as the Right to the Teinds, and Obligation to pay, might indeed divide, the one going to the Heir, and the other to Executors. But that is not sufficient to make them separatly prescribe, or the one prescribe, and the other subsist. For the parts of a Contract are thus far inseparably connected, that implement of the one cannot be sought, without performance of the other.

SECT. IV.

Concerning Tacks of Tithes.

TACKS May not only be set of Lands, but also of Tithes, or any thing that is useful, or yields Prosit. As Prelates, whether Monastick or Ecclesiastick, were uncapable, before the Reformation, to Feu out their Teinds: So neither could they grant long Tacks, for these were accounted Alienations.

(a) And to the granting of short Tacks, the confent of the plurality of the Members of the Chapter, or Convent beside the Setter behoved to be adhibited. Therefore a Tack of Teinds subscribed by the Provost of Lincluden, and the

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⁽a) Balfour Pratt: Craig, Lib: 2: Dieg: 10.

equal half of the Chapter, was found null, in regard the Provoft, as the direct and principal Setter, could not be reckon'd to make up the Quorum of the Chapter, whose Consent to the Provost's Deed, should have been testified by the Subscriptions of a Majority beside himself. (a) But then the want of the Subscriptions of such persons of the Chapter, as were either out of the Countrey, or Minors not past Fourteen Years of Age, was not judg'd a Nullity in the foresaid Tack; albeit these enjoyed their own share of the Patrimony of the Benefice, and were the most part of the Chapter, if the plurality of the rest were consenting: Nor is it needful for any of the Chapter to confent, if all of 'em be Minors. (b) It is sufficient to the Validity of a Prelates Deed, that persons, as Members of the Chapter or Convent, are subscribing to it, without necessity either to instruct their Admission, or to shew by the Erection-Charter, that Subscribers are at least the Majority. But this admits of contrary Probation: For a Tack being only subscrib'd by the Provost of a Collegiat Church, and three of the Prebends, was found null, as wanting the Confent of most part of the Chapter: In respect the same was proven to have confifted of eight persons beside the Provost, by production of provisions given to eight Subaltern Prebends, and of some Feus or Rights set by the Provost with

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⁽²⁾ March 14: 1622: L. Drumlanrig against Maxwel of Hills. (b) Eodem die inter eosdem.

their Consent, without necessity of producing the Foundation-Charter. (a) The necessity of a Chapterly Consent to the Deeds of Prelates, was carried so far, that the Deanry of the Cathedral Church of Aberdeen being more tify'd to the Colledge, Tacks of the Rents on't fet by the Principal and Members, without Consent of the Bishop and his Cathedral Chapter was found null. Because, by the Mortister was found null. Because, by the Mortister was found null. Because, by the Colledge, the Dignity was not extinct, but the Colledge came in place of the Dean; and their Deeds requir'd the Consent of the Chapter, as the Deans did formerly. (b)

2. As nothing could be done by a Prelate without the Concurrence of the most part of his Chapter: So neither could the particular Members of the Chapter do any thing in their particular Benefices, without him and the Majority of the Chapter confenting. Consent of the new Chapter of St. Andrews, erected by the second Act of the Parliament 1617. was not found necessary to a Tack of Teinds fet by a Member thereof in his proper Patrimony, not belonging to the Bishoprick. Because the Act appoints only a special Chapter for authorifing the Bishops Deeds by their Confent: Which could not be extended to infer a necessity of the like Consent by the Bishop and his Chapter to Deeds done by a Member of the Chapter, where such a Con-

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⁽a) June 24: 1623: Inter cosdem. (b) March 26: 1629: Colledge of Aberdeen contra Menzies.

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ent was not necessary before that Ad. For ome of that Chapter might have their own proper Chapter, or might possess Benefices pertaining to the presentation of Laick Pas gons: And so no Consent would be requisite in these cases, but of their own Patrons or

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2. As I observ'd in another place, (b) the Votes are to be reckon'd according to the Number of Benefices, and not of the Beneficiaries; the Chapter Members need not to be Chapterly conveen'd, but their Confent will be good though separatly obtain'd, if before the Death or Deprivation of the principal Granter of the Right; the Seal of the Bishop and Chapter of St. Andrews doth stand for their Subscription; and in all Cases, where there is no Chapter or Convent, the common Seal, with the Kings Confirmation, is all the Solemnity required to the Prelates Deed.

4. By the common Law, benefic'd persons might have granted Leafes or Tacks, concurrentibus bis quæ in jure requiruntur, for as many Years as they pleas'd: But now they are bound up and restrain'd by Acts of Parliament to certain Limitations and Provisions. Whereby Prelates are render'd incapable to fet their Teinds in Tack, even with the Chapters Conlent, for longer than Nineteen Years, and interior benefic'd persons to set for longer, with Consent of their Patron, than their own Life-

time,

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⁽a) November 9: 1624: Hope contra the Minister of Craighall. (b) Part 1: Chap: 8: Seet: 1, N: 4,

(314)

time, and five Years after. (a) But inferior tacks of Beneficiaries need not to confult the Patron in the fetting of three Year Tacks: (b) porrow And longer Tacks are valid for three Years certain (c) A Patrons accepting of a Right to a Tack and till was underfrood as a subsequent Consent there, to, (d) and a Tack was found sufficiently authoris'd by the Confent of one, in whole favours an Obligement to dispone the Patro. nage was conceiv'd. (e) As to the Question whether an Ecclesiastick having a Commission from his Patron to fet Tacks, needs any more express Declaration of his Patrons Consent to particular Tacks fet by him; vide Part 1.6h. 8. Sest. 2. N. 4.

5. Tacks of Teinds are either Conventional or Judicial. Under Judicial Tacks I comprehend these set by Order of the Commission of the Church, which were not liable to be stinted to the course of time prescrib'd by the 4. Act. Parl. 22. Fa. 6. Conventional Tacks were the only habile way of transmitting Teinds of old, and are yet the ordinary way.

6. The Terms of Entry and Ith in Tacks must be express'd and certain. If the time of Entry is not specified, its understood to be from the Date of the Tack. Tacks without a definite Ish are null: (f) Therefore Sub-

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⁽a) Act, 4: Parl: 22; jund: Act 15: Parl: 23: Ja: 6. (b) Att 200: Parl: 14: 7: 6. (c) July 18: 1668: John foun contra Houdoun. (d) January 19: 1669: Earl of Athole contra Robertson of Stroman. (e) July 6: 1666: Parson of Morum contra the Lairds of Beirford and Beinstoun. (f) July 17: 1688: Oswald contra Ross.

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nferior Tacks of Teinds granted by the principal Tacks-Patron men to the Heretors for the Annualrent of Years certain Number of Years, and thereafter ay a Tack and till Re-payment of the Money, was found null as to Singular Successors, except for paricular Years therein-specified. (a) But Tacks in Wadfets are valid without a definity Ish. viz. During the not Redemption; and in Prorogations Tacks of Teinds to begin after the Ih of the former, though the Titular be in the interim denuded. Because the Wadset is granted with the Burden of the Back-Tack, which is in Corpore Juris, and is only a Restriction of the Wadfet Right; and Prorogations are even by Authority of Parliament. (b)

7. A Tack without a particular Duty is null quoad Singular Successors. (c) One who had a Tack of his own Teinds having obliged himfelf to warrand an Infeftment in his Lands free of all Teind except the Tack Duty, upon which Infefrment and Possession followed; and having afterwards affign'd the Tack for an Onerous Cause: The Obligement to warrand was found equivalent upon the matter to a Sub-Tack, or an Affignation to the Tack; and therefore the Receiver was prefer'd to the posterior Affigney. (d) But yet an Obligement to dispone Tithes for a certain price contain'd in a mutual Contract was not found to make a

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⁽a) July 8: 1673: Montgomery contra Parishioners of Kirkmichael. (b) Dirletoun Doubts and Questions in Law, Title Back-Tacks. (c) Stair Instit: Lib: 2: Tit: 9: § 29. (d) March 20: 1629: L: Finmouth contra Weems:

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Title for Prescription even to a Singular Suce cessor : Unless he would either pay the price, or prove payment thereof. (a) Tack Duties affect all conjunct Tacksmen in solidum, in so far as their Intromission extends. (b) Some. times the Tenent gives a Graffum beside the Tack Duty. Tacks of Teinds us'd in old time to be granted for small Tack Duties and large Graffums: But now Tack Duties are rais'd and Graffums fallen low. A Charge upon a Bond granted by the Town of Glasgow to their Bishop, as a Grassum for a Tack of Tithes, was fustain'd, although it was alledg'd for the Town, 1. That the Bond was exorbitant, and the Burgh lesed thereby. 2. That the Tack was null, as granted by the Setter indufriously to prejudge his Successor, after the Setter had a clear prospect of promotion to the See of St. Andrews then vacant. 2. The Entry of the Tack was confer'd in tempus inhabile after the Bishops Translation, and so might be quarrel'd by his Successor. (c) The Reafons of the Decision were, I. Albeit Magigistrats of Royal Burghs cannot alienate their Freedom and Priviledges effentially conflituting them a Burgh, without Consent of Parliament: Yet they have the free and full Administration of all Affairs thereof. Succeeding Magistrats may indeed pursue them for Damages by Malversation, or Milmanage-

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⁽a) February 9: 1704: E: of Galloway contra Mackguffock of Rusco. (b) July 14: 1675: Colledge of Aberdeen contrathe E of Northesk and others. (c) November 1685. Arch-Bishop of St. Andrews against the Magistrats of Glasgow. ment:

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ment: But cannot annul their Deeds in faryours of a Third Party, which would cut off all Commerce and Transaction with Burghs. 2. It was Jus Tertii to the Town, and only competent to the succeeding Bishop to quarrel

the Tack upon these Nullities.

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8. The Contracters Names are a necessary Substantial in a Tack, which should be clearly express'd. Albeit Tacks are strictissimi juris. they will go to Heirs, even without a Service. when Heirs are not therein mentioned. It was Debated (a) though not Decided, If a Tack of Teinds fet to a person and his Heirs in particular Lands, would belong to his Heirs whatfoever, when these lands are fold by, or Adjudg'd from him? But there feems to be good Reason, why in such a case the Tack hould pass to Heirs whatsoever. For the Qualification in Favours of Heirs in fuch or such Lands, is only defign'd to clear the Fiars intention as to the persons he defires to succeed him in the Right of the Tithes : And no Limitation or Clause irritant, inferring the Loss of them upon his being dehuded of the Lands. A formal Tack in Writ containing the Subject set, Contracters Names, Tack-duty, Ih, and Entry distinctly therein express'd, and cloth'd with Possession, will Defend the Tenent against Purchasers, and a Superior as to Liferent Elcheats; but not against the Superior of a Ward Vaffal, claiming the Ward and

⁽a) Betwixt the Duke of Lauderdale and the E. of Tweddale January 23. 1678.

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Non-entries; though he be oblidged to continue the Tenent in Possession till the next

Term of Whitsunday. (a)

9. Beneficed persons cannot effectually set new Tacks till the Old be expyr'd; and if they set Tacks to begin after the Ish of the former, and die in the Interval before the time of Entry by the last Tack, the same is null. (b) No Tutor nor Tutor's Factor may take a Tack to his own behove of the Teinds of the Minors Lands: and if he do, the same will accresce to the Minor. But such a Tack of Teinds where the Lands were Liferented by the Tacksman's Wise, was sustain'd for her Lisetime. (c)

derstood to be past from by after payment of more than the Tack-duty: although that was alleadged to have been done by way of Gratification. (d) And the accepting of a New one, differing in the Substantials of Tack-duty, in Durance, and commencement from a former, and beginning before the Ish thereof, is understood to be an Innovation, and passing from the other, though Ratified in the last Tack: as being incompatible therewith, unless there be also a Provision to bruick by either of the Tacks. (e) Clauses irritant in Tacks are not ordinarly

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⁽a) Act 26. Par. 3. Ja. 4. (b) June 18. 1629. Dumbar contra Turner. (c) 28 March 1632. Lady Ludquhairs contra L. Haddo. (d) November 9. 1677. Rutherfoord contra Murray of Skirling. (e) 23 January 1678, Duke of Lauderdale contra the E. of Tweddale.

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ourgeable after they are once incurr'd. But where the irritancy in a Tack of Teinds was ncurr'd through a probable ground of ignoance, the Party was allowed to purge at the Barr by payment of the Tack-duty and Dammages. (a) Objections and Nullities against Tacks of Teinds, are excluded by Prescription. (b)

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11. Short Tacks cannot be assigned, if not expresly granted in Favours of Persons and heir Affignies: But Liferent Tacks may. (c) And fall under the Assigneys single Eschear. Not as if an Affignation altered the Nature of the Subject affigned, by making that moreable, which before was Heretable: But because an Affigney has not the Right for his own Life-time, but only while the Cedent lives, who may die before him.

12. Some Tithes are Tax'd by Rentals to lo many Bolls yearly, either expresly, or tacitely by long use of payment, from which a Rental is presum'd. Express Rentals are sometimes formally perfected by a Writ under the Teind-masters hand. Sometimes they'r only Recorded by way of memorandum in his Book: and then make Faith against the Titular and his Heirs; (d) but not against lingular Successors. (e) Rentals are tacitely

interrupted

⁽²⁾ July 14. 1675. Colledge of Aberdeen against the Earl of Northesk. (b) July 7. 1677. Parson of Prestounhaugh a-sainst his Parishioners. July 14. 1675. Old Colledge of Aberaten against the E. of Northesk and others. (c) July 16. 1672. Duff contra Fouler. (d) Stair Institut, lib. 2. tit. 9. 9. 18. (e) July 5. 1625. Aytoun contra Tenents.

interrupted by contrary use of payment, o expresly by taking Tacks for a definite time 12. If a Tacksman of Tithes continue qui etly to possess after the Tack is out, he wi have the Benefite of Tacit relocation, which is to be Subject only to the former Tack-dury till interrupted by Citation or Inhibition Simple use of payment infers Tacit relocation and Defends till interruption. (a) For in that case a verbal Tack is presum'd. relocation, though introduc'd from a prelum's Confent, is fo far established by Law, that payment of a small Teind duty to a Minister after he was denuded of his Right to the Tithes was lustain'd, both as an intire Exo neration for years pay'd, and as a Rule to the

fet by a Benefic'd person, was allowed as a good Title to pursue according to former pole fession for the Teinds of more years than the Benefic'd person could set. (c) But Tacit relocation being only a presumptive continuation of the Right, it was found to be taken away by an express inconsistent Deed of the Setter, Homologating another persons Right although no interruption was us'd against the Tacksman. (d) Nor doth our Law distin

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⁽a) 28. November 1676. Sheil contra Parishioners of Pristounhaugh. (b) January 19. 1669. E. of Athol contra Rebertson of Strowan. (c) January 16. 1663. E. of Errol contra the Tennents of Urie, (d) July 18. 1671. E. of Human tentra L. Ryslaw.

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vil Possession. (a) And therefore to prevent the Surprize, and Disappointment of Titulars and Tackimen we indulge Tacit relocation. not only to immediate and natural Possessors. but also to Tacksmen of Teinds. And if it were otherwise, the Consequence would be Dangerous: fince what then could hinder Titulars and old Tacksmen of Teinds to conveen all Heretors, whole Tacks and Sub-Tacks of their own Teinds are long ago fecretly expyr'd for the full Value, thirty nine years backward; their Tennents of Stock and Teind joyntly, being ordinarly the natural Possessors. The continuing then to uplift accustomed Teind-duties, being such a Possession as the Nature of the Subject, at least the common use thereof, doth admit, it must furnich the Benefite of Tacit relocation. There be two Decisions, 12 December 1621, L. Lag contra Parishioners of Lintoun, and 6 March 1622, Lady Lauristoun against ber Tenunts, Which seem at first view to Clash with what I have advanc'd; But they proceed upon Specialities: For in the former the Tacksman's taking a new Tack to commence ayear after the 1sh of the first, without comprehending the intermediate year under Debate, was a Tacit passing from Tacit relocation; and in the Latter, the Sub-Tennents palfing by the Tacksman, and paying his ers of Pri Acnt to the Principal Setter, was a personal

⁽a) December 3. 1628. Whiteford contra Johnstoun.

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Objection to hinder him from Counteracting his own Deed. Altho Tacksmen of other Mens Teinds have the Priviledge of Tacit relocation by feven years Possession of Uplifting the Teind-duties: Yet the Earl of Dum. fermling, who was Forfeited in the year 1690, having had from King Charles the first. a Tack of the Teinds of Dumfermling, which expired in the year 1695, and his Estate having been under Sequestration ever fince the Forfeiture, in the hands of Factors put in by the Lords of Session, upon application of Creditors who had Adjudg'd the Tack, without Receiving before it was expyr'd from the Factor any part of the Duties: the Factors Possession was found not to operate Tacit relocation in Favours of the Creditors, to the prejudice of the Queens Right by the Forefaulture, and Expiration of the Tack. Albeit no Forefeiture doth now hinder lawful Creditors to affect Tacks standing in the Forefeited Person.

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⁽²⁾ February 1705. The Officers of State against the late Fastor and Creditors of Dumfermling.

SECT. V.

Concerning Rights of Tithes acquired, and Extinguished by Possession.

T Emporary and Qualified Rights of Tithes are acquired to Church-men, without any Title, by three, or feven, or ten, or thirteen years Possession; and absolute perpetual Rights by Possession for the space of Fourty years. (a) Laicks having Titles though Lame, acquired Possessory Judgements by seven years uninterrupted Possession, and absolute Rights by the long Prescription of

fourty years.

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2. As real Rights of Property, which are the most six'd and Substantial part of what a Man doth call his own, goes only by Succession to Heirs, for keeping up of Names and Families: So our Law doth Secure such as have by singular Titles, attain'd and continued in Possession of any of these important Rights, for the space of seven Years, from being disturbed at Random; allowing them to Defend their Possession without Disputing Summarly upon their Titles, which can only be taken away by Reduction, or Declarator, or in a Competition of Rights; and then Authors must be cited. This we call the

⁽a) Vid. Part 1. Chap. 9. Sest, 2.

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Benefit of a Possessory Judgement, which hath some faint Resemblance of actio publiciana in the Civil Law. It was introduc'd partly as a punishment to negligent persons for not pursuing their Interest sooner: Partly from a confideration of the prefumption of Right by posfession so long acquiesced in, and the general interest of Possessors, not to be put to a summar Debate upon their Author's Right, that probably is not in their hands, and whereof they are not suppos'd to know the Circum-Stances and Import so well as the Author him-

felf, who therefore must be called.

2. Seven years possession upon an Infest. ment of Tithes is a good ground of a Possesfory Judgement. Yea, the Exception of such a possession upon an Infestment in Vicars Land cum decimis inclusis, where the Teinds were not contain'd in the Dispositive Claule, but only in the Tenendas and the Reddende, was found Relevant to defend in a Possessory Judgement. (a) But a person having been feven years in possession by vertue of an Infeftment in Stock and Teind, and produc'd his Authors Right, that was only a personal Obligement to dispone a Tack of Tithes for a price, contain'd in a Minut of Contract, was found not to have the benefit of a Possesfory Judgement. (b) And in a Competition for the Annualrent of the price of Teinds after a Decreet of Sale, the Lords found no

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⁽a) July 13. 1636. Bishop of Edinburgh contra Brown. (b) July 9, 1703. Earl of Galloway against Mackguffock of Rusco.

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possessory Judgement upon an Inferment in these Teinds and possession before the Valuation. (a) Because by the Sale possession and Property were confounded, and thevery Subject innovat; the price being come in place of the Teinds, which is not the proper Subject of a Possessory Judgement, and the Annualrents not furrogat to the Fruits, but arising ex accidenti, for that the Money had not been inflantly taken up.

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4. Some are of Opinion, that Tacks of Tithes, whereupon no Intefement can follow, though clothed with seven years possession, do not carry a Possessory Judgement; asif the Favour of an Heretable Infefrment were the only cause of that Priviledge. This Sentiment I cannot subscribe to; Because it seems to contradict the Analogy of Law, the Nature of a Possessory Judgement, and the Current of Decisions. For, 1. A Possessory Judgement is competent both for, and against Servitudes: (b) And Tithes are a kind of Servitude or Burden affecting the Profits of Lands. (c) 2. My Lord Stair fays in one place, (d) That Rights equivalent to Infefrment are the Title of a Possessfory Judgement; And in another, (e) That a Possessory Judgement is an Effect of Infeftments, Tacks, or the like. 2. The Favour of Infeftment cannnt be understood as

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⁽a) February 16. 1703. Scot of Bowhil against Jerviswood and the Earl of Hume. (b) Stair Instit: lib. 4. tit: 17: §. 2. and 3. (c) Ibid: lib: 2. tit: 8. Pr. (d) Ibid: lib: 4. tit: 22. §. 5. (e) Ibid; lib: 2. tit: 1. §. 24.

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the only Reason of a Possessory Judgement: for a Tack of Lands from one as Heretable Pro. prietar, gives the Tacks-man the Benefit on't. without necessity upon him to alledge that the Setter of the Tack was infeft. (a) But I may fay the unaccountable negligence of the Proprietar is one of the great Motives of a Possessory Judgement: Seeing it takes no place against the Queen, who is not prejudged by the neglect of Her Officers. 4. The same Reason that secures a Possessor by Infestment, though flowing from him who had no Right, and frees him from the whole Duties; should much rather fecure a Tenent from payment of more than his Tack-duty, till his Tack be re-For a Tack is a real and compleat duc'd. Right in suo genere, effectual by Act of Parliament against singular Successors; And all the other Reasons for a Possessory Judgement, viz. The favour of possession, the negligence of the party interess'd, and the Author's not being in the field, do concur and take place in Tacks. 7. It can be made appear from a multitude of Decisions, that Tacks of Tithes cloth'd with feven years peaceable possession, are the habile Subject of a Possessory Judge-It was fustain'd upon a Tack of Teinds fet by an Abbot. (b) Where also the Nullity of a Diminution of the Rental, contrary to the Act of Parliament 1581, by an undervalued Conversion of Victual into Silver-duty, was

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⁽a) 1 December 1676. Hume contra Scot. (b) July 13. 1636. Bishop of Edinburgh contra Brown.

not receiv'd by way of Exception against a tack of Tithes. A Possessory Judgement was lustain'd in favours of a Tacksman of Teinds who posses'd bona fide, albeit his Authors Right was reduc'd; the Tacks-man not being cited in the Reduction. (a) Though seven years possession after interruption of the bona fides by a Process, was found not to be the ground of a new Possessory Judgement. (b) Yea, even a Tack of Teinds fet by a Literenter, was found to afford this priviledge upon seven years possession, after the Granters

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It is needless to object, that the priviledge of Possessiony Judgement takes no place against a poinding of the Ground for Annualrents, Feu-duties, or other Real Burdens. For a debitum fundi is compatible with possession of the Property, which it only affects: Whereas possession of the Teind pro suo, whether by Tack or Infeftment, is inconsistent with, and exclusive of anothers Right and possession at the same time. But an Heretors simple polsession of his Tithes without a Title, or his not payment for feven years, doth not furnish a Possessory Judgement, more than such a possession for Fourty years would infer Prescription. 'Cause 'tis plain in that case the Tithesbelong to some body else, being due out of all Lands not priviledg'd: And the Proprietar of the Lands could not bona fide polies the

⁽a) July 19. 1664. Dowglass contra L of Wedderburn. (b) Intereosdem. (c) January 23. 1678. Duke of Lam. derdale contra the Earl of Tweddale. Tithes

Tithes sine titulo. And this is my Lord Stair's meaning, when he tells, That a Possessory Judg. ment is not competent in Actions for Teinds, because

the Rights thereof are Notour. (a)

yithout seven years bona fide possession. But possession bona fide for a little time in Movemables, and a Year, or Term, or thereby, in Heretage, is sufficient, as to the Effect of make

ing fructus consumptos suos. (b)

6. It is a Question much tos'd, but very in diffinctly handled by Canonifts and others. Whether Tithes fall under Prescription? Some maintain the Negative, because Tithes belong to the Parochus, as a Reward for his performing of the Ministerial-duties. (c) . And that in acknowledgement of our Subjection, and GOD's Dominium Universale; (d) which are Subject to no prescription of time. (e) Others stand to the Affirmative side of the Question, upon these Grounds; r. Custom is laid down as the Standard for determining the payment of Tithes. (f) And that they may be prescribed is supposed and implyed, C. cum contingat 29. C. dudum 31. Extr. de decimis, C.ult. S. pen. Eod. in 6. 2. All Matters of Property are lyable to prescription, unless specially fenced a

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⁽a) Instit: lib: 4. tit: 17. § 3. (b) Ibid: lib: 2. tit: 1. § 24. (c) C. pervenit 9. caus: 16. g. 1. (d) C. tuanobis 26. Extr: de decimis. (e) L. 6. C. de prescript: 30. vel 40. annorum. (f) C. cum sint: 18. C. ad Apostolica 20. Ext: de decim.

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7. But most of these Opinionists of both perswasions do so confound the acquiring Rights to Tithes by Prescription, with the prescription of a priviledge of not paying Tithes, that in stead of Illustrating they Darken the Controverly. Many have endeavoured to trim up and adjust these different Opinions, by Distinctions, to their particular Fancies. We find some who hold that a Right of Tithes is liable to prescription, at the same time restricting priviledge to Ecclesiasticks by the C. causam que 7. Extr. de prescript. with this Quality, that even such cannot prescribe a Right to Parochial Tithes, unless where the Minister is competently provided beside. (b) Only they except the Case of Tithes truely or presumptively Feu'd to Laicks before the Lateran Council: Which they allow one Lay-man to prescribe against another. (c) Raymond, Hostiensis, Panormitan, and Boerius, lay, That Personal Tithes are lyable to prescription, as not being ordained by the Law of Moles, but that Predial-tithes cannot prescribe; Others maintain, That though the Right of thele cannot prescribe, the Quota may; (d) And the Bishop of Worcester (e) tells

us,

⁽a) C. nihil prodest 2. C. accedentes 11. C. auditis 15. C. sum ex officii 16. Extr: de prescriptionibus. (b) Covarruv: var: resol: lib: 1. cap: 17. N. 6. Barbos: de officio & potest: paroch: cap: 28. § 2. N. 48 & 49. (c) Ibid: N 51. (d) Traite touchant l'origine des dixmes & l'obligation de les payer. Sect: 29. (e) Ecclesiastical Cases relating to the Rights and Duties of the Parochial Clergy, pag: 218 and 219.

us, That the English Judges fell once upon the Knack of diffinguishing betwixt Decimam Gar. bam, and Decimas Garbarum, finding that the Lord of a Mannour might prescribe a Right to the former, but not to the latter. Some think that Laicks may prescribe an Immunity from paying Tithes out of his own Lands, by immemorial possession of Freedom; but that a Right to other Mens Tithes, as a thing more unfavourable, cannot be so acquired. (a) Others contend, that Lay-men cannot prescribe an utter Exemption from payment of Tithes, but only as to the Quantity, and modus decimandi; Yet that Prescription both qualifies the payment, and determines the not payment in favours of Ecclefiafticks. (b) Some again are as positive, That neither Laick nor Clergy-man can prescribe an Immunity from payment of Tithes even by 1000 years, unless against a Lay-man to whom they were feued before the Lateran Council. (c) Others there be who distinguish nicely betwixt Cufrom and Prescription. (d) And Lastly, Those who affert that prescription of a Right to the great Teinds carries the smaller as an Accelfory; It at the beginning of the prescription small Teinds were payed, and no other perfon during the Currency receiv'd them. (e)

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⁽a) Canisius de decimis cap: 17. N. 16. (b) Hughs par-Sons Law, chap: 25. (c) Rebuff de decimis Quast: 13. N. 55. (d) Covarruv: var: refol: lib: 1. cap: 17. N. 8. verf: 10. (e) Al: monet cum auctar: otton: breviar de decim: cap: 4. 8. That

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8. That amid'st such perplext variety of Sentiments, we may steer a distinct Course. in order to a right understanding how Teinds prescribe; We are to distinguish the Parsonage from the Vicarage, and the Positive Prescription from the Negative. By the positive Prescription, we mean a Right to Tithes acquired by Fourty years possession, and by the Negative, an Exemption from payment.

9. There is no Negative Prescription of Parsonage Tithes: (a) That is, no course of time doth sopite and extinguish the Obligation to pay fuch Tithes. 'Tis true private Rights are lost by not being claim'd or made use of within Fourty years, as a just punishment of the negligent person, in whose favours they are conceiv'd: And these being excluded from any pretention through their long filence, fuch as were formerly lyable are secure, fince no body else can molest them. But the obligement to pay Tithes being founded on publick Law, and not upon private Right, the jus exigendi continues, though not exerced for Fourty years: Unless that Law hould univerfally go in desuetude. Nor can any person prescribe a Right to his own Tithes without a Title; no more than one could prescribe an Immunity from Customs or Feuduties, if they should chance not to be requir'd But then prescription within Fourty years. will sweep away the bygone Teind-duties pre-

⁽a) Espeisses des benefices Eccles. tit: 10. sett: 3. N. 4 & 5. Grimaudet des dismes liv: 3. chap: dernier. ceeding

ceeding Fourty years. (a) And a Tack of Teinds not cled with possession within Fourty years from the date, was sustained for the time and the Duties only preceeding coming: Fourty years found prescrib'd. (b) This be. ing agreeable to the Nature of annual Prestations; whereof every one imply a distinct Obligement, and prescribe by Fourty years filence of the Creditor. (c) Yea, Prescripti. on will exclude Teind-duties within Fourty years of the last payment, if not pursued within that time. (d) But though the Negative Prescription doth not commonly hinder the Titular from feeking the Tithes of all years within the Term of Prescription: Yet an Heretor having bona fide upon a colourable Title of Exemption intrometted with, and confum'd his Teinds for Fourty years and more, without Interruption; was not found lyable for bygones. (e)

10. Since Prescription runs against Churchmen as well as others, and is effectual to fortis fie any colourable Title; a Right of Parson age Teind may be prescribed, as well as others by the positive Prescription. (f) Which potive Prescription extendeth even tolong Tacks; not to make them perpetual, but unquarrellable during their time. (g) For Objections

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⁽a) Faber in suo Cod: lib: 1. tit: 2. Def: 66. February 7. 1666. Earl of Panmure contra Parishioners of - January 19. 1669. Earl of Athole contra Robert son of Strowan. (c) L. 7. S. ult: C. de prescriptione 30 vel 40 annorum. (d) Arg: February 7. 1672. Blair contra Blaiis. (e) June 16. 1681. Frieland contra L. of Orbistoun. (f) Stair Instit: lib: 2. tit: 12. 9 21 0 22. (g) Ibid.

nd Nullities against Tacks are excluded by rescription. (a) And possession of a part of leinds in a Tack is sufficient to confirm the Tack as to the whole. (b) A Tack of Tithes et to a Laick by a benefic'd person for seveal Lifetimes, and nineteen Years before the a of Parliament 1621, was sustain'd upon he account of Prescription, whereof the runing was not found to be hindered by the etters Lifetime, altho non valebat agere. (c) Right of Tithes acquired by the politive rescription, is still but a Right of Tithes, and lable to the common Burden of Ministers. Provisions and Augmentations; For even the Commission's Decreet of Sale for a just price doth not fecure against these. Two persons paving entered into a mutual Contract. whereby the one was oblig'd to dispone some Tithes to the other, for a certain price to be paid by him: It was found, that the Obligement o pay the price could not prescribe, while the Obligement to dispone was current. (d) But yet Prescription was sustain'd against one of the Parties in a Contract of Marriage, as to his fus persequendi Solutionem Dotis, altho Interruption was us'd, and Decreet obtain'd by the other upon the Obligement to imploy the

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⁽a) July 7: 1677: The Parson of Prestounhaugh contra his Parishioners. July 14: 1675: Old Colledge of Aberdeen against the Earl of Northesk and others. (b) Spotswood de Possessione, Lady Merchistoun contra Laird of Wrightshouses: Stair Ibid: Tit: 1: § 13. (c) February 1685: Paterfon egainst the Hereters of Newhall. (d) Vid: Supr: Chap: 6: M#; 30

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Money upon Land for the Heirs mentioned in the Contract. (a) Because the Objection of Non-payment of the Tocher was competent to the person payable to, when Execution was sought against him for imploying thereof, and being omitted, it was probable, that the Mo.

ney was paid.

11. Prescription of a Right to Tithes is not to be extended to the Tithes of Novalia: (b) That is, he who prescribes a Right to the Tithes of all the Arable Land in any Parille. cannot thereby pretend to the Tithes of fuch as afterward happens to be brought in and laboured. For Prascriptiones certorum Jurium de prælenti, non extenduntur ad futura consimilia. And besides that Prescription is a Priviledge which ought to be strictly interpreted, and not extended; the Novalia were not formerly posses'd, and so can never come under it: Seing Præscriptio sine Possessione non procedit. Et tantum præscriptum quantum poßeßum. much for the Prescription of Parsonage Tithe; we shall next enquire into that of the Vicarage.

12. Vicarage Teind doth vary according to the custom of places, and may be either introduced, or modified, or taken off by Prescription. So that both the Negative and Positive

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⁽a) November 27: 1630: Laird of Lauder contra Laird of Colmssie. (b) G. cum contingat 29: Extr: de Decimis, G: ult: Sult: eod: Tit: in 6: Covarr: Var: Resol: Lib: 1: Cap: 17: N: 13: Canis: de Decimis, Cap: 11: N: 2: Rebuss: de Decim: Q: 14: N: 18: & 25: Bruneman. de Jure Eccles: Lib: 2: Cap: 6: N: 9. (e) Reg: 3: de Reg: Juris in 6.

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Prescription takes place here. For Instance 40 years possession was sustain'd to entitle the Minister to a certain Vicarage Duty out of Salt and every Weavers Loom in the Parish. (1) Long custom was found to determine the 20 Lamb to be the Teind. (b) A Right of Teind Fish was found constitute against the Buyers by use of payment past Memory of Man. (c) Vicarage Teind was not found due out of the Yards, which had never payed Vicarage before. (d) And 40 Yars possession of Immunity from Teind Fish, is a Ground of Exemption in time coming. (e) 'Tis true, in the cited circumstantiat case, the Lords required immemorial possession; but that was only in respect of the time the Bishops had been out. As to immemorial possession, I hall content my felf to notice en passant, that Rebuff (f) will not have any person to be a habile Witness for proving thereof, who is not 10 years of Age, or at least so many years elder than 40 as Law requires to make one Doli Capacem. Immemorial Prescription, according to Duaren, (g) is circumscrib'd by the course of 100 years: But in Molina's Opinion, (b) no possession should be called imme-

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⁽a) November 29: 1678: Birnie contra the Earl of Nithsdale and his Tenents. (b) February 11: 1665: Scot of Thirlestane untra Scot of Broadmeadow. (c) February 15: 1631: Bryce, Temple, and Schaw, against Brown: December 13: 1664: Bishop of the Isles contra James Hamiltoun. (d) June 30: 1668: Minister of Elgin contra his Parishioners. (e) November 24: 1665: Bishop of the Isles contra Fishers of Greenock. (f) De Decimis, Quast: 13: N: 99. (g) Consuetud: Feud: Cap: 5: N: 7. (h) De Justitia & Jure, Tom: 1: Disput: 76: in prin

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morial, if it be remembred, that the same had a beginning within 100 years, altho the precise Term on't be forgot and out of mind.

13. The Lords once indeed made a Diffine aion betwixt Vicarage commonly paved throughout the whole Kingdom, as of Stirk Lamb and Wool, and the Vicarage of Milk and other particulars; finding the latter, and not the former, liable to Prescription. (a) But thereafter, (b) upon a Reclaiming Bill, the forelaid Interloquitor was stop't. Prescription of a Right to Tithes of one fort of Fruits, will not carry a Right to these of a new and different product, that was not formerly Tithable. (c) Except where the Heretor doth plainly alter the Use of his Ground in Fraudem or Emulationem of the Titular of the Tithes. And if one has Right to the Teind Fish taken in a certain Bay, and they hall happen to leave that place of their old Haunt, and be fish'd up in some other Creek, where no Fishing had formerly been usual: It were hard to fay, that the Teind Masters Right could there take effect. I know it was pled for the Bishop of the Isles against the Fishers of Greenock, (d) that he having Right to the Teind of all Fish taken within his Diocese, Possession, as in a Barony, of uplisting the same in one part, should maintain the Right

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⁽a) June 16: 1666: Minister of

Lord Elphinston. (b) June 21: the said Year. (c) Arg:

Dec: June 9: 1676: Burnet contra Gibb. (d) November 24:
1665.

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nefice. But this Alledgeance was Repelled and taken off by the Fishers their founding upon the Negative Prescription, as to the Teind of Fishes taken in a particular place. Nor was a Ministers being in use to receive a certain kind of Vicarage from some of his Parishioners, sustained relevant to subject the rest of the Benefice to the like payment. (a)

14. Having by this time sufficiently explain'd the different Rights of Tithes, and how they are acquired and extinguished: The Burdens affecting them shall be the Subject of our

next Enquiry:

(1) November 28: 1676: Sheil contra the Parishieners of Presounhaugh.

CHAP. VII.

Concerning the Burdens that Teinds are li-

NDER the Law, a Tithe was pay'd out of the Levites Tithe to the Priests, called Decima Decimarum, which the Pope now layes Claim to where his Authority weighs. And in the 26th year of King Henry the 8ths Reign, the English Clergy were Cess'd in a Tenth of their Tithes to the Crown. Which Burden they have ever since lyen under, till

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of late Her Majesty Queen Anne, by a Gene rous Act of Royal Bounty hath not only bee pleas'd to remit the poor English Clergy al Arrears of these Tenths; But also to Conse crate that Ecclesiastical Branch of Her Reve nue, for a perpetual Augmentation of smal Vicarages, and other insufficient Cures.

2. The Burdens that Teinds are Affectable with among us, are either Legal, or Conven-

tional.

2. The King's Annuity of Six of every Hundred Merks of Teind converted in Money Ten shilling for each Boll of the best Teind Wheat; Eight shilling for the best Bear; Six shilling for Oats, Meal, Pease, and Rye, three shilling where Oats do not render above hall Meal; and proportionally less, when the Victual is of inferior goodness: This Annuity I say, is a Legal Burden upon all Teinds. except Decime incluse, and those belonging to Bishops, Ministers, Colledges, Hospitals, and other pious uses. (a) Sir. G. Mackenzin, (b) Say's, it was found to be Debitum fundi because the 15 Act of Parliament 1633, gave the King Right to bygone and future Annuities. But yet this Annuity seems to be no more Debitum fundi, than Tithes themselves are. For when our Law defign's to make any thing Debitum fundi, and to Oblige fingular Successors, it uses expresly to be Declard that fingular Successors shall be lyable. As to

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⁽a) Act 15. Parl, 1. Char. 1. (b) Observe on the fail

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the Clause in the Statute, Ordaining payment to his Majestie, of Annuity for years past, and to come; That must be understood in a habile sense, so as to make Intrometters only with the Teinds of bygone years lyable for bygone Annuities, The Surrenderers did not Submit the Tithes of their own Property: and yet these were lyable to the Annuity; which was payable whether the Teinds were fold or not; (a) And out of Unvalued as well as Valued Teinds. (b) When the Tithes were only valued, the Titular was bound for it; and the Heretor after a Sale. (c) And where Tithes payed to Burrows for maintaining of Ministers, Regents of Colledges, School mafters, and Hospitals, exceeded what was Expended for these pious Uses: the Burrows were obliged to fatisfie the King's Annuity out of the Superplus. (d) When any Titular acquired Right to the Annuity of his Tithes, the Right of Annuity became extina: Quia res sua nemini servit. And therefore a Disposition of Tithes, from one having also Right to the Annuity, was found to carry the Tithes free of Annuity, altho the same was not exprest in the Disposition. (e)

4. Ministers Stipends and Augmentations are another Legal Burden, and the main one, to which Teinds are liable: against which no Right or Title whatsoever can Secure:

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⁽a) Act 17. of the Said Parliament. (b) Act 15. Ibid. (c) 16 March 1632. (d) Decreet: upon the Burrows Submission. (e) Forrester of Logic against Wordie of Cambuston and his Tenents.

And the truth is, till once the Parish Minister is sufficiently provided, no person can safely buy his own Teinds. For they are always subject to be evicted for that end, by the com. mon Law, and our Custom; even after the Heretor has bought 'em: unless there be free Teind in the Titulars hand, in which case he must relieve the Heretor; (a) tho that could not be required of a Tackf. man. (b) Nor is a Tack of Teinds or a Pen. sion out of 'em to be Affected with the Mimisters provision, so long as the Titular has any free Teind within the Parish. Sometimes the Commission declares Heretors free of all farther Augmentation, as when a great Silpend is imposed for the Minister.

s. Where all the Teinds of a Parish were under Tack, and the Tack-duty less than did fusice to make up the Ministers Scipend; the Commission us'd to raise the Tack-duties; and to recompence the Tacksmen, for the Loss and prejudice sustained by the Burden imposed, were impower'd to Renew or Prorogate their Tacks even to a longer time than the Titular himself could have set by Law. (c) A Decreet of Prorogation requires nei ther Summonds nor Execution for its Warrand. In the year 1649, the Burden of Augmentations being cast upon diverse Tacksmen, of Teinds without any Recompence made to them in consideration thereof, and Prorogati-

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⁽a) February 8. and 15. 1643. (b) January 27. 1635. fc) Att 4. Parl. 22. Ja. 6. ons

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ons in Favours of others, having been loft during the Troubles: the Commission 1661. were Authoriz'd to grant Recompence and Prorogation to these Tacksmen, according to the Rule prescribed by the Commission 1617; the Titulars being always cited thereto. (a) Sir Robert Hepburn of Keith, who was both Patron of the Parish-Church, and Tacksman of his own Teinds being Decerned in 1650, to pay to the Minister an Augmentation of 8r lib. 12 Bolls, 2 Firlots of Victual, over and above the former Tack-duty, he got a Prorogation of ten 19 years added to his Tack, to begin at expiring thereof. (b) Sir Robert Hepburn of Myrtoun, who had Tacks of his own Teinds, from the Chanter and Sub-chanter of Murray, with Consent of the Bishop, Dean and Chapter, having freely given off a Manse and Glebe to the Church of Kinlofs with an Augmentation of the Old Stipend, got three Liferents, and three Nineteen years added to his Tacks. (c) An Augmentation being impos'd in Favours of the Minister of Aberlady of a Boll, 3 Firlots of Victual, and 16 lib. of Money upon the Earl of Haddingtouns Teinds within that Parish, 19 Bolls, and 143 lib. upon the Lord Elibank's, 28 Bolls, and 143 lib. upon the Lord Gosfoord's, and 15 Bolls, and 104 lib. upon the Teinds of the Laird of Luffnes: In contemplation whereof, all of

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⁽a) Act 61. Parl. 1, Char. 2. (b) 5 February 1662. Hepburn of Keith against Calderwood. (c) 26 February 1662.

em got Prorogations for the same space of five Nineteen years of their Tacks of the Parsonage Teind, and seven Nineteen years of their Tacks of the Vicarage; altho their Proportions of the Augmentation differ'd. (a) A Bill reclaiming against the foresaid Augmentation made to the Minister of Aberlady, being given in to the Commission by the Patron, Representing that the Minister had already Nine Chalders of Victual, which is more than the Legal quota of Stipend, and that the Augmentation was design'd but as a Blind to furnish some colourable pretence for a Prorogation of the Heretors Tacks, where. by not only he as Patron would be prejudg'd, but also the succeeding Ministers cut off, from the Right to them as Parsons after expyring of the Tacks; and craving a stop to the Decreet till he saw the Proces, and was heard to debate why no Augmentation could be granted: The defire of the Petition was refus'd, in regard no part of the Augmentation was impos'd upon the Patron, nor any sufficient Interest produced by him to hinder the Augmentation. (b) Many others who, at present, for Brevities sake, shall be nameless, obtained also Prorogations of their Tacks, in Recompence of Augmentations, and new Provisions to Ministers impos'd upon them. In the case of Augmentations and other Burdens sustained by Titulars, the Com-

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⁽a) 30 July 1673. (b) 30 July 1673. Mackgie Minister at Aberlady against his Parishieners.

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missions 1661, and 1663, got Power to Augment proportionally, the Rates for Valuing and buying of Teinds, appointed by the Parliament 1633.

6. Teinds not Heretably Disponed belong now to Patrons in Lieu of their former Right of presenting Ministers: but with the Burden of Tacks and Ministers Provisions or Augmentations; even of two Ministers in one Parish if the Commission think fit. (a)

must be payed off the whole Head before exacting of Cess or Tribute-Money. (b) But in Stotland, free Teinds pay Cess as well as the Land. The Teinds of the Parish of Lilliesleaf being valued by the Commissioners of Supplie, at 1257 lib. 13 sh. 4 d. according to which Valuation, the Earl of Roxburgh as Titular was Cess'd for the same; and several of the Heretors having obtain'd Decreets of Valuation and Sale; the Earl pursued them for his Relief of the Cess, and publick Burdens impos'd upon these Teinds since the Sale.

8. Conventional Burdens affecting Teinds are Pensions, Annuities, Thirlage, and the like. I have cleared up the Nature of Pensions, Part 1. chap. 8. Sect. 3. As for Annuities, if the Teinds out of which the same is payable, come to be evicted by a Supervenient Decreet of Locality in Favours of a Mini-

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⁽a) Act 23. Seff. 2. Act 26. Seff. 4. Parl. W. and M. (b) C. cum non sit 33 vers. Statuimus Extr. de decimis Carpzov. Jurisprud. consist. lib. 1. tit. 8. def. 136. n. 1. Zoes, in decretal. lib. 3. tit. 3. cap. 1. n. 12.

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fter. The Person lyable to Warrand the And nuity, must make it up out of some other Fund. (a) And a Lady being provided to fome Teinds which her Husband was Obliged to make worth fo much of yearly Rent to her. and two Chalders of Victual out of thefe Teinds being affigned by the Commission to the Minister: The Husbands Heir was decerned to make up the Rental diminish'd by the Ministers Provision; albeit the Teinds continued to be of the fame Value as before; fince they were less worth to her. (b) For a Clause obliging to uphold the Rental, would be effectual for Relief, not only in the case of eviction in jure, but also in the case of eviction casu fertuito by Inundation, Devastation, or the like. (c)

9. Thirlage is imposed on Tithes, either tacitely, or expressly. Tacitely, as when an Abbot by a Clause in his Charter, astricted omnia grana, which was found to extend to the Teinds then belonging to the Abbot; so as to Thirle them, unless a Feu-duty were payed, both for Stock and Teind. (d) But this Exception of the Teind will not hold in Milns belonging to Chuch-men. (e) For as Thirlage is more easily sustain'd against Church-Lands than others: (f) So it is also more easily constitute in Favours of Church-

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⁽a) 19 June 1697. Hume of Linthill against Hume of Wedderburn. (b) 28 July 1635. Lady Cardross contra Lord Cardross her Son. (c) Stair Instit. lib. 2. tit. 3. § 46. (d) Ibid. tit. 7. §. 17. (e) Ibid. (f) Ibid. §. 16. December 7. 1665. Veatch contra Duncan.

Milns. Thirlage of Land to another Man's Miln, doth not infer a Thirlage of the Teind thereof acquired afterwards by the Heretor who Thirled the Lands. (a) For the postenor acquisition was not intended to add any Benefit to him who had the Right of Thirlage, and to Subject the Purchaser to a heavier Servitude. Nor was it regarded that the reft of the Heretors of the Lands affricted did grind their Teinds at the Thirle-Min: Since their voluntar Deed could not put a Tye upon others. Nor was long Possession in molendino regio, of receiving Multures for all Corns of a Barony promiscuously without exception of Teind, found to bring the Teind under a Thirlage, Except fuch as tholed Fire and Water there. (b) For albeit long Possession may suffice to Thirle the Kings own Barony; yet other mens Rights of their Lands and Teinds can not be Thirled without their Consent. But 40 years payment of Multure, conform to a Clause in a Charter aftricting omnia grana crescentia without exception of Teind; was

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10. Having discuss'd the different Rights of Tithes, and the Burdens affecting them: we shall shew in the nixt place, how they are

sustained relevant to subject the Teind to a

made Effectual by payment.

Thirlage. (c)

CHAP. VIII.

⁽a) July 7. 1635. L. of Innerwerk contra Hamiltoun. (b) January 8. 1662. Stuart contra Feuars of Aberledno. (c) January 21. 1681. Grierson contra Gordon.

CHAP. VIII.

Concerning the payment of Teinds.

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OTHING hath been the Subject of more Difference and Contention in this Land, than the payment of Tithes. The refusing to pay them hath produced many trouble. some and vexatious Law Suits. And the Seve. rity and Rudeness in exacting them, hathoccasion'd much Pike and Animosity: Which fometimes broke out into open Acts of Malice of Revenge. David Straitoun, as Bishop Spotswood (a) relates, being offended at the Rie gorous Exaction of Teind Fish; gave Order to his Servants to cast every Tenth Fish they took into the Sea, that the Church might go and receive it where the Stock was taken. But some wicked Caithnes-Men are reported, for the like cause, to have carried their Resentment farther against their Bishop Adam; whom they burnt in his own House, after they had first scourg'd him, and killed his Chamber-Boy. In handling the payment of Tithes, we shall first speak to the Subject Tithe able. 2. The manner of payment. 3. The persons to whom Tithes are payable. And, 4. By whom.

(2) Hift: of the Church of Scotland, Page 66. SECTION

SECTION I.

Of what things Tithes are due?

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THE Clergy not contenting themselves with the Predial Tithes enjoin'd by Mo-(es Law, Personal Tithes came to be exacted; and about the end of the Twelfth Century Tithe was claim'd for Hunting, Honey, Trade, not excepting the Commerce of Whores; and if Spanbern may be credited, (a) the very Alms of the Poor was subjected to Tithing. And as the Canon Law grew into Authority with us: So in the 35 Statute of that Provincial Council held in Scotland in the Year 1225 under Pope Honorius 3. (b) Tithe was ordained to be payed of all things que Innovantur as Corn, Hay, Lint, Gardens, Milns, Fishings, Hunting, the Brood of Animals, Wool, Milk, Cheese, Chickens, Eggs, Trade, Silva Cedua, or Woods us'd to be cut, Fruits of Trees, and the like.

2. The Doctors are never more confused and indistinct, than in what they write concerning the Subject Tithable: And their greatest Dissiculty hath been about small Tithes, which are the common Endowment of Vicarages. In determining what things come under these, Lawyers do mightily clash

⁽a) Oper: Theolog: Part 1: Observ: in Cap: 27; Levit: in fin. (b) Vid: Ch: 3: N: 3.

and perplex themselves, but they attribute much to Custom in that Matter, and think, that if the Tithes of Corn and Hay only are expresly provided to the Parson by the Foun, dation, then all the rest falls to the Vicar. Some tell us, Tithes ought to be payed out of all the Fruits of the Ground. (a) But the most part hold it for a general Rule, that Tithes are only to be payed of things that do annually increase. (b) From whence my Lord Coke (c) concludes, that no Tithes are to be payed of Minerals, or what is of the Substance of the Earth, such as Stone, Turff, Tinn, Lead, Coal, Chalk: But at the same time (1) he grants, that by Custom a perfon may have Tithes of fuch things as are not Tirhable of common Right. Others exprelly maintain, that Mines and Quarries pay Tithes (e) It would feem consequential from the foresaid Rule, that no Tithes can be due for Houses, these having no Annual Increase; nor yet for Saffron, whose Heads are gathered but once in Three Years; nor of Silva Cedua, which perhaps will fland 20 Years before it be But as to these, and several other Tithable Subjects, the English Lawyers vary mightily in their Decisions. They nicely distin guish betwixt Timber and other Trees, al-

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⁽a) Rebuff. de Decimis, Qu: 8: N: 3: 8: Barbosa de Officio Potestate Paroch: Part 3: Cap: 28: § 1. N: 1: Zoef: in Decretal: Lib: 3: Tit: 30: Cap: 1: prin. (b) S: Simon Degge Parsons Counsellor Part 2: Ch. 3: Shepherds Parsons Guide, Chap: 5: princ: Stillingfleets Ecclesiastical Cases, Pag: 183. (c) 2: (e) Re-Instit: 651: Seiett Cafes 16. (d) Ibid: Pag: 664. buff: Queft: 8: N: 23: Menet: Cap: 4: N: 33, 34. lowing

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lowing the former only to be Tithe-free. They will have a kind of Tithe to be due for Houses in London, and no where else. They tell us, that if a Wood be Grubbed, Ploughed and Sown with Corn, it pays Tithe presently; but that any barren Heath or waste Ground being brought in and Cultivate with great Charges, must pay no Tithe for Seven Years, but only the Tithe it payed formerly. And yet they teach, that Fenny Land drained, or Land gaine ed from the Sea with much Expense, and turn'd to Arable, doth pay Tithe. They don't allow Tithe, except a personal one, for old Corn Milns, which never payed formerly. but subject new Corn Milns and other publick Milns to Tithing. And yet Sir Edward Coke (4) lays, it was never judicially determined. that he knows of, whether any Tithes are due for Milns or not?

2. Its another Rule of Law among the Dodors, that things Fera Natura, or wild by Nature, are not Tithable, unless they are tamed and keep'd under custody, and so become a Mans Property: As Bees gone into feveral Hives belonging to particular persons, Pigeons in a Dove-House, Fishes in a Pond, and Rabbers in a Cunningair; for all which they tell

us Tithe is due. (b)

4. No Tithe is due, according to the English Lawyers, for Grass, upon which profitable

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^{(1) 2:} Instit: 622: Littl: Rep. (b) Stillingsleet Ibid: Pag: 188, 189: Rebuff: de Decimis, Qu: 8: N: 10: A: Moneta cum Auctar: 7: Mon: Brev: de Decimis, Cap: 5: P: 282: Degge Ibid: Chap: 8; Shepherd Ibid: Sect: 7.

Cattel are fed, such as Work Beasts, or those

that give Milk; because they are either ad

vantageous to the Teind Master in Labouring the Ground, or afford a different Tithe; no yet is there any Tithe to be claim'd for the Pa fture of a Mans own Saddle Horses: But there i a certain rate payable for the Herbage of Agistment of barren Cattel. (a) They al low no Tithe for Beafts or Birds of Pleasure without Profit, such as Haulks, Hounds, Apes, Thrushes, Popping-Jays, and the like. (1) 5. But now with us Personal Tithes take no place. (c) And the payment of Predial Tithes is much regulated and determined by Local Custom. For Hay, Lint, Hemp, Stags, Swine, Eggs and Fruit are some where Tith. able, in other places not; in some places again, and not in others, the Teind Fish is claim'd. and not always after the same manner. No Tithe ought to be payed for Fishes taken in alto Mari: (d) The Sea being among those things that are common to all. (e) But then Tithe for these is exacted by the Heretor upon whose Ground the Boats Land by vertue of their Landing. Generally Corns, Stirks, Lambs, and Wool are every where Teinded: (f) But Kail. Herbs and Roots no where in Scotland that I know; and were found not Teindable.

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⁽a) Degge Ibid: Chap. 5: Shepherd Ibid: Sect. 3. 6 4: Hughs Parsons Law, Chap. 25. (b) Degge Ibid: Chap. 12: Shepherd Ibid: Sect. 7: Hughs Ibid. (c) Stair Instit: Lib: 2: Iit: 8: § 6. (d) Espeisses des Benefices Ecclesiastiques, T. 11: Sect. 4: N: 2. (e) § 1: Instit; de Rerum Divisione. (f) June 16: 1666: Minister of contra Lord Elaphingstoun, Stair Ibid.

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(a) Nor are Garden Fruits Teindable in many places abroad, unless when the Proprietar fells them. (b) Because Gardens are ordinarly contrived either for Pleasure, or for the necessary Use of the Proprietar. carage is ordinarly pay'd for Cows and Sheep: But not for Horses or Mares, or any Yeld Goods, except out of their Grass Meal. But in a word, 'tis altogether Local. (c) Being introduc'd by no positive Law, but only by Cue from: And therefore he who purfues for Vicarage of any kind, must prove former Use of payment. (d) By the Civil Law, where aCustom is doubtful and uncertain, the Matter should be rul'd by the Custom of Neighbouring places. (e) But what is payed for Vicarage in one Parish, ought not to be a Rule to those in the Neighbour-parish: Since there is sometimes a different Vicarage-tithe payed in different places of the same Parish. Ministers Glebes are Teind-free, whether they confift of Arable-land; (f) or of fixteen Soums Grass. (g) Which Priviledge is not only competent to Glebes of Churches established by Authority; but also to Glebes voluntarly mortified to Chappels where Divine Service is ulually performed. (b) By the Law of Eng. land a Vicar is only free from paying Tithe for his Glebe to the Parson Impropriate, so long as he keeps it in his own hands: But if

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⁽a) June 9. 1676. Burnet contra Gibb. (b) Espeisses Ibid N.3. (c) Vid: supra cap: 5. N.9. (d) June 30. 1668, Minister of Elgin contra his Parishioners. (e) L.34. ff. de Reg: Juris. (f) Ast 62 Parl: 5. Ja. 6. (g) Ast 19. Parl: 23. Jai 6. (h) 9. June 1676. Burnet contra Gibb. he

he let it out to another, the Tacksman is ly. able to the Tithe. And a Parson impropriate pays no Tithe for his Glebe while possess by himself, but a Purchaser or Tenent has no pretence to the Exemption. (a) But with us Ministers Glebes were found Teind-free even after they were out of their possession, and pass'd into Laymens hands: Unless it could be instructed that the Laick Possessor pay'd Teind within Fourty years for the Glebe come in his hand. (b) Tithes are due out of the Fruits of Novalia, (c) but not by Prescription of a Right to the Tithes of the laboured Ground. (d) Change of Grain, or the inverting the use of Ground, doth sometimes alter the Tithe, and sometimes extinguish it. (e) One thing ought not to be twice tithed in one year. (f) But if there be two Cropts in the year, as Strabo fays there is in India; (g) a Tithe will be due out of each of 'em. (b) No Tithe can be requir'd for After-maths of Meadows, or Baulks in Corn-fields, or the Stubble of Corn. (i) Tho Corn and Hay Growing in Orchyards, are subject to Tithing as well as the Fruit thereof. (k)

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⁽a) Shepherd Parsons Guide ch: 9. feet: 3. N. 6 & 7: (b) Mackenzie Observ: on the 62. Act 5. Parl: 3a. 6. (c) Canist de decimis cap: 11. N. 2. Espeisses Ibid. Tit: 10. sect: 1. N.9. Bruneman de jure Ecclesiast: lib: 2. cap. 6. N. 9. (d) Ibid. (e) Vide infra sest: 3. N. 5. (f) Hughs Parsons Law, chap: 25. (g) Lib: 15. (h) C. ex parte 21. Extr: de decimis Rebuff. de decimis Q. 18. N. 7. Carpzov: jurisp: consist: lib: 1. tit: 8. Def: 131. N. 7. Degge Parsons Counsellor part 2 149: 3. Espeisses Ibid. Sett: 4. N. 1. (i) Degge Ibid: Shepherd Parsons Guide, chap: 5. Sect: 4. Hughs Ibid. (k) Degge Ibid: Shepherd Ibid.

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SECT. II.

In what manner Tithes are to be payed?

HE manner of paying Tithes is ruled by the Custom of the Place: (a) And resolves in the distinct Heads of Matter, Time, and Place. Which we shall consider in order as they ly.

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The Matter of Tithes, or what is to be payed in name of Tithe.

THE Queta of Tithe hath varied in different Places. In some it is the thirty part of the annual Increase, and in others the twenty; some people make it a twelfth, others the eight part: But generally the Tithe is considered as the tenth Proportion. 'Tis a general Rule in payment of all kind of Tithe, that neither the best nor the worst of the Fruit should be given for it. (b) We shall first consider what is pay'd for Vicarage, and then what is pay'd for Parsonage. Tithes.

⁽¹⁾ Degge Ibidem. Shepherd Parsons Guide. chap: 6. Pr. (b) Arg: 1ev: cap: 27. v. 32, & 33, Rebuff Q. 6. N. 29. 211. N. 1, Hispan; Q. 14. N. 17.

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2. The Tithe of Bees is the Tenth of their Honey, or Wax. (a) The Tithe of all tame and domestick Fowl is to be pay'd in their Eggs, or Young in their proper kind, according to the custom of the Place. But where they pay Tithe of Eggs, there is no Tithe of the Young; Nor e contra Tithe-eggs payed where the Young is tithed. (b) When we speak of the Tithe of Milns, Quarries, and Mines, the meaning is not that every tenth Stone of a Quarry should go for the Tithe; But only the tenth part of the Profits thereof. (1) So the Miln-Tithe is the tenth of the Multure or what is given for Grinding, (d) or the Tenthtoll dish; if the custom of the place hath not otherwise determined. (e) For as Vicaragetithes were only introduc'd by custom; so they are altogether regulated by it as to the matter and manner of payment.

3. Parsonage-tithe is either drawn ip/a corpora, or valued Bolls are payed conform to

Rentals, or Decreets of Valuation.

4. Where one has Right to draw the 19/4 corpora, he must have them in palea. (f) And unmixed of the same Goodness as they came off the Ground, and cannot be oblig'd to take Corns of a Forein Growth for his Teind (g) Tho then the Teind is casual, more or less, accordi and I Sterili 5.

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⁽a) Shepherd Ibid: feet: 2. (b) Degge Ibid: chap: 11. (c) Rebuff. Q. 8. N. 23. Monet: cap: 4. N, 33, 34: (d) C. Extransmissa 23. Entr: de decimis Rebuff. Ibid: N. 6. Monet: Ibid: N. 35. (e) Shepherd Ibid: fest: 1. Degge Ibid: chap: 9. (f) G. Tholosani Syntag; part: 1. lib: 2. chap: 26. N: 2. (g) Carpzov: Jurispr: consist: lib: 1. tit: 8. Def: 126. Espeis. Ses des Benefices Eccles; tit: 10. Sect: 2: 9 2. cording

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6. Rental-teind Bolls are pay'd when the Teind hath been tax'd to so many Bolls yearly, either by an express Rental, or tacitely by old use of payment. Rental Bolls were found due tho exceeding the Teind of the Cropt: (a) Altho the Pursuer of a Spuilzie would get no more than the proven Quantity of true Teind.

6. Use of payment imports a verbal Tack. and defends per tacitam relocationem, until Interruption by Citation or Inhibition. (b) Yea. ule of paying an inconsiderable Duty to the Minister who had ceased to be Titular, was found to regulate the payment to the true Titular till Interruption. (c) But payment to a Minister who had an Assignation to the whole Parsonage_teind, relative to a Decreet of Locality, wherein some Chalders of Victual out of the Teind were modified for his Stipend, was found not to infer tacite Relocation: So as to hinder the Titular to claim the Teind remaining over what was pay'd to the Minitter. (d)

7. Valued-teind-Bolis in my Opinion may be latisfied in Corn which grew upon another Ground; the determined Quantity and Qua-

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lity

(d) C. Monet: Espeis-

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d: chap: 6. N: 2.

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⁽a) March 22. 1626. Lennox of Branshogle contra Tenents of Balfron (b) 28 November 1676. Shell contra Parishioners of Prestounhaugh (c) 19. January 1669: Earl of Athole contra Robertson of Strowan (d) 30. June 1698. Sir Williom Bruce against Sir David Arnot.

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·lity being observ'd. For as the Titular cannot compell the Heretor to fow his own Ground, he can as little pretend to have his valued Duty only out of the Product there. of. I find fome Debate whether valued Bolls ought to be pay'd according to the heaped Measure, or the Modius aquatus? The common Opinion resolves in this, that Use and Wont should be the Rule. (a) Tolerabilia enim cenfen. tur que vetus comprobat consuetudo: (b) que obii net vim veritatis; (c) Et dirigit ac informatomnes actus mundi. (d) But that if no certain Custom appear, we must own and acquiesce in the straiked Measure, as that which is more univerfally received. (e) With us valued Bolls should be delivered according to the Measure of Linlithgow; (f) where the Standart of the Firlot is kept. And by an Act of the Commiffion of Parliament, 19. February 1618, all Grain was ordained to be met by Straik. The liquid price of bygone Teind_bolls is the Sheriff-fiars of the respective years. (g)

8. Valued Bolls in a Decreet of Valuation will not be due if the Land ly waste, and there be no Crop: For the valued Teind. duty is only Debitum Fructus, and not Debitum Fundi. (b) The Valued-duty is indeed the

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⁽a) Carpzov: jurisprud: consist: lib: 1, tit: 8. Des: 127.

N. 4. (b) L. 13. 9 1. st. de pollicit. (e) L. 1. C. de

Servitutibus & aqua. Gail: Observ 88. N. 7. (d) A. Faber

Cod: lib: 4. tip: 7. Des: 21 (e) Carpzov: Ibid: N. 6. & seqq.

(f) 29. May 1627 Act of Commission. (g) 14. July 1704.

Bothwel of Glencorse against Portersield of Comistoun and his Tenents. (h) 20. February 1662, Callender against Monro.

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fix'd Standart for payment communibus annis; and as the Titular gets no more in name of Teind, however plentiful the Cropt is, he gets no less be it never so bad: But if there were no Produce, or nothing of a Crop, there could be no claim for a Valued-duty, more than for the Drawn-teind when there is nothing to draw. Nor can the Valued-duty be exacted from any, save only the Possessor, and Intrometters with the Rents for the time: Unless it be secur'd by Infestment, conform to the Act of Commission, the 6th of August 1630; which seldom, if ever, is done. (a)

9. The drawing of Teind in ipfis corporibus may be interrupted by the payment for some years of Rental, or valued-bolls: And these may be interrupted, either express by Tacks for a definite time; Or Tacitly by contrary use of payment, whereby even the Teindduty contain'd in Decreets of Valuation may beinterrupted. But all these Interruptions have not quite the same Effect: For use of payment doth no longer interrupt the drawing of Teind, or payment of the Duty contain'd in Decreets of Valuation, than till the Interruption is taken off, either by the Titular's requiring, or the Heretor's offering debito tempore the ipfa. corpora, or the valued Duty in the Decreet. So, a person was allowed to free himself in time coming of a certain Quantity of Teind-Bolls, for which he had been formerly decerned in several Decreets, by making offer of the Teind in

⁽¹⁾ Vide, Infr: chap: 9. fest: 3. N. 11.

kind. (a) Rental bolls were no longer found due, than till the ipfa corpora were offered, and Intimation made to the Teind-master, that the payment of that Quantity would be no longer continued. (b) And voluntary pay. ment of more Bolls in name of Teind for the fpace of feven years than was due by a Decree of Valuation, was found not to oblige in time coming. (c) More than a Vassal who for diverse years pays a greater Feu-duty than is contain'd in his Infestment, can be forc'd to pay always that higher Duty. But Rentals being once interrupted by contrary use of payment, and that use of payment Re-interrupted by Citation or Inhibition; the Heretors will find themselves lyable thereafter for the full Teind; And it will not be sufficient to offer the old Rental-bolls. (d) But yet a Minister and his Predecessors in Office, having been in use to receive a precise number of Teind-bolls yearly for thirty years conform to Discharges produced, which did compleat his Stipend modified by Decreet of Plantation, was not debarred from feeking a larger Quantity by vertue of an Assignment from the Bishop for years after the use of payment was interrupced: He the Minister proving that his Predeceffor

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⁽a) February 20. 1633. Colledge of Glasgow against Stuart. (b) March 22. 1626. Lennox of Branshogle against the Tenents of Balfron. (c) Gilmoir Decis: 36 L. of Bassenden against Bells, February 1662. (d) December 12. 1679. Colledge of Aberdeen against the Town.

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ceffors had received payment of the said greater Quantity according to an old Rental. (a)

II.

The time when Tithes are to be payed.

DErsonal-Tithes, according to the Canonists, should be pay'd at the years end; and Predial_tithes collectis statim fructibus. (b) The Tithe of Calves and Lambs should be pay'd after they are weaned from Sucking. (c) The Doctors will have Tithes to be pay'd before they be fought. (d) But as to Parsonageteind, it would infer a Spuilzie in our Law, if the Heretor should at his own hand separate the same from the Stock, without previously requiring the Titular or Tacks-man to do it.

2. These who had Right to Parsonage-teind frequently delaying to draw it in due time, Land-labourers were reduc'd to a grievous alternative Strait, of either suffering their Corns to rot upon the Ground, to gratifie the Hus mour and Malice of an Oppressor; or to run the hazard of a Spuilzie. In order to a Remedy of this Grievance and Inconveniency, feveral Acts of Parliament have been made for regulating the time of Teinding: (e) But the

prefent

⁽a) July 3. 1630! Seymour contra L. Balgillo. (bi) G. Tholos: Syntag: jur: part 1. lib: 2. cap: 26. N. 3. (c) Rebuff. 2.6. N. 3. 30, 31. Barbos: collect: doctor: in lib: 3. decretal, tit: 30. C. cum homines 7. N. 5. Shepherd Parsons Guide, chap: 6. fest: 2. (d) Rebuff. Q. 12. N. 7. & Segg: (e) Att 73. Parl; 6. Act 48. Parl: 11, Act 8, Parl: 18. Act 5. Parl: 21. Act 9. Parl: 22. Ja: 6.

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prefent standing Rule, is that prescribed in the 9. Act, 22 Parl. Ja. 6. whereby all former Me. thods are innovated and altered. It ordains the Owner of the Teinds, if he dwell out of the Parish, to appoint a Factor within the same, or some adjacent Clachan, and to intimate publickly his Name & particular place of Residence the last Sunday of Fuly, or first Sunday of August, and that Teinding (if the Pos. fessor pleases) may be at three times, once for the Croft or In field-corn, another time for the Out field, and a third time for the Bear. Who may eight days after compleat shearing of each Sort, or at least about nine parts thereof, require the. Teind master at his dwelling place, if it be within the Parish, and if not, his Factor, either personally, or by intimation to the Minister, or at the Factor's place of Residence, to come and draw the Teind within four days. Wherein, if they fail, or if the Owner of the Teind, being an Out-dweller, hath not settled a Factor for him, in the Terms above-mentioned; the Possessor may safely, in either case, Teind his own Corn, and carry away the Stock, leaving the separate Teind upon the Ground: Which he is obliged to preserve, and keep skaithless, for the space of eight days after expyring of the Term of Requisition, and no longer. And if Teinding proceed while about a tenth part of the Corns is standing un cut down, the like order of Requisition is to be us'd as to that, when shorn. But to Legitimate

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Legitimate this manner of Teinding by the possession, it must be done before Witnesses. (a)

3. Payment of valued Teind-bolls should be

made betwixt Tule and Gandlemass. (b)

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III.

The Place where Tithes ought to be pay'd.

TITHES, according to the generality of the Doctors, should be carried home to the Parsons Barn-y ard by the Parishionersupon their own Charges, where that can be easily done. (c) Others think this to be unreasonable, and without Foundation in Law or Custom: (d) alledging that all the Tye upon the Owner of Goods lyable to a Teind, is only a Restriction, that he cannot carry any ofthem off, till that be drawn. A third Sort own, that we are to be rul'd in this Matter. according to Custom, which varies in different places. (e) It is the Custom of Antwerp. where the Teind-corn is us'd to be drawn, to separate the same from the Stock, and leave it upon the Ground. This is also done in Bavaria and the Upper-Palatinate. But in these parts they carry Rental-bolls pay'd instead of Teind,

home

⁽a) Stair Instit: lib: 2. tit: 8. § 22. (b) 23. March 1631. (c) Covarruv. lib: 1. var: resol: cap: 17. N. 8. vers: 8. Carpzov: jurisprud: Consist: lib: 1. Tit: 8. Des: 135. N. 5, & 6. (d) Guid: Pap: Decis: 283. Adrian: quod lib: 5. Art: 1 § 2. Rebuss. 2. 5. N. 23. Espeisses des Benefices Eeclesiast: tit: 10. sett: 2. § 3. (e) Addit: ad Bruneman: de jure Eccles: lib: 2. cap: 6. N. 15.

(362) What-ever fa home to the Parlons house. vour in this Matter may be indulg'd to Minifters as to their Teind-bolls, it would feen not unreasonable, that the Titular or Tacks. man of other Mens Teinds, should come to the Lands and carry off their Teind after itis drawn; and to the Heretor's Barn, to receive valued Bolls. As a Pensioner of Coals must come to the Coal-hill and receive them, and a Pensioner of Victual to the Barn-door; From whence they must transport their Coals or Corn to their appointed place upon their own Charges. (a) The Tithe of Fish should be pay'd at the Water-fide. But the caufing throw every tenth Fish into the Sea, to put the Teinders to feek their Due where the Stock was taken, (b) was an Action favouring more of Malice than Juffice.

(a) February penult: 1623. Paip contra L. Wolmet. (b) See the beginning of this Chapter.

SECT. III.

Of the Persons to whom Tithes are payable.

In time of Popery the Parish Priest as Rector or Parson had a presumptive Title to all the Tithes of his Parish. (a) I call it only a presumptive Title, because frequently Parish Churches were appropriate to Monastries and Nunneries, &c. Whereby the

(a) Vid: Supr: Chap: 6. Sest. 1.

Convents

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Convents claim'd the Parsonage tithes, and seed Vicars to serve in their Room. Who in some places had affigned for their Maintenance a small pecuniary Stipend, in others the smaller Tithes, and in some places a Share of the greater Tithes. In that Provincial Council held in Scotland under Pope Honorius the Third, (a) Tithes were ordained to be pay'd is ad quos pertinere noscuntur, i. e. Personis & Vicariis.

2. According to the Canon Law, Personal Tithes are to be pay'd to the Minister of the Parish where the Party lives; And Predial ithes belong to the Incumbent where the Fruits are reaped (b) And therefore Tithe-fish is not due to the Minister of the Parish where the Owners & Fishers dwell; But to him in whose Bounds the Fishes are taken; That is, where the Boats ly, or from whence they go for ta king, and whither they return for unloading the Fish. (c) I am informed, that by antient Custom, the Herring-boats all along the Coast side of East-Lotbian and Merle, pay the whole Teind to the Parish Minister of the Owner of the Boats, when these boats land within his Parish; and Half-teind when they land elfewhere, and the other Half to the Minister within whose Precinct they land. But pay no Teind upon the account of Docking and lying in another Parish: That being a Priviledge for which the Master of the Ground receives

⁽a) Cap: 35. (b) Vid: Supr: chap: 5. N. 5 & 6. (c) Sir James Stuart's Notes upon Dirletoun's Doubts, Title, Teindfijb.

(364)

ten Shilling for Anchorage. And this practice feems not unreasonable; for if Fishers should be allowed to pay their Tithe where they Dock their Boats, it were easie for them to frustrate the Stipends of their own Ministers at their pleasure, by laying their Boats where

they can make the best Bargain.

2. The Doctors tell of a Custom some. where received, to pay the Tithe of Milk to that parish where it is Milked, and of Cheese where it is made, and of the Brood where they are brought forth. (a) But where the Tithe of Milk is payed, there is nothing due for Cheese made of the other Nine Parts on't; and where the Cheese hath been tithed, no Tithe is to be payed for the Milk. (b) Be cause idem non debet bis decimari. The Tithe of Animals is due to the Parish-Church where they feed. And if they be Summer'd in one, and Winter'd in another Parish; or if they feed all the day long in one, and ly during the night in another, in either case both parishes may claim an equal share of the Tithes. (c)

4. But now Tithes not Heretably Disponed are given to Patrons to compense the Rescinding of their Rights of presenting Ministers, but with the Burden of Tacks, and the natural Burdens affecting Teinds, even of two

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⁽²⁾ Rebuff q 6. Barbos. de offic, et potest. Parochi cap. 28. § 1.

n. 12. G. Tholos: Syntag: jur: Part 1. lib. 2 cap: 25. n. 2.

(b) Degge Parsons Counsellor Part 2. chap: 6. Shepherd Parsons guide chap: 5. (c) Rebuff ibid: n. 15. & seqq: G.

Tholos: Ibid: Barbos: ibid: Degge ibid: Shepherd ibid: chap: 7.

Ministers

Ministers in one parish, if the Commission think fit. So that the ancient Right of the Parochus to the Teinds of his own Parish, is now resolved into a Right of Security upon the Patrons Title for a competent modified

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s. Since the Reformation and Suppression of Monastries, the Tithes of other mens Lands, which once belonged to them, are now partly payable to Titulars of Erection, or to their Tacksmen; and partly confounded with the Stock, the Heretors having bought them, either voluntarly, or by Order of the High Commission, conform to King Charles the first's Decreet arbitral. Other Tithes are payed to Burghs. Royal for the maintenance of their Ministers, Colledges, or Hospitals.

6. It is an important Question whether he who has Right to receive the Tithes of one kind of Fruits out of Lards, may claim the Tithes of another kind as Surrogatum, when the Land is fown with other Seed, or improven to a different use, by being turn'd from Corn to Grass, or from Grass to Corn. would feem that he may according to the Canon Law. (a) But in order to fet the Matter in a clearer Light, let us consider the different Cases of One having Right to both Parsonage and Vicarage Tithes, and where they belong to diffinct Titulars. In the first case, I hold it for a Principle, that the Heretor may jure dominii Labour his Ground or

⁽a) C. Commiffum 4 extr: de decimis.

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not, and make it produce the Subject of Par. fonage or Vicarage Tithe as he thinks fit. (a) And the Titular can only claim the Tithe of the present product, if that was for merly in use to pay Tithe: otherwise no Tithe is due. (b) Unless it can be made appear that the Heretor industriously fo Dif. pos'd of his Land to Defraud the Titular. But this is not to be prefum'd: For we cannot reasonably suppose that any man would out of Envy to the Teind-mafter prejudge himfelf, and fuffer his Lands to ly Fallow, for Example, if thereby his own Rent would fink and fall. And if he find his Account in converting his Land to Grafs Rooms, who can hinder that which is the native effect of Property? Now as the Tithe master hath not fuch a Right to the Tithes as to compell the Heretor to Labour his Ground, or to hinder him in the free Excercise of his Property, by making what use of it he thinks fit: fo if no Tithe hath been formerly due for the new Improvement; there is no reason to induce an Obligation for it in time coming, upon the account of any Title to the Tithe of a different kind. If the Titular of the Tithes find himelf at a Loss by the Heretors arbitrary disposal of his Ground, he may apply to the Commission for Remedy by a Valuation,

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⁽²⁾ Rebuff. de decimis q. 6. n. 35. Espeisses des benefices tit: 10. sect: 2. n. 5. & 6. Grimaudet au traite des dismes liv: 3. chap. 3. n. 7. 8. (b) sune 9. 1676. Burnet contra Gib: Stair Instit: lib. 2. tit. 8. §. 31.

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to fix and liquidate the value of his Tithes for the future. I would also incline to think that an Heretor is as much at Liberty in the cultivating and ordering of his Ground, when there are different Pretenders to the Parsonage and Vicarage Tithes, as when one has Right to both. And that he may by inverting the ufe of his Property bond fide, advantage the one, to the others prejudice, as to the payment of bygone Tithes. But then the Party lesed may foon Right himself by a Recourse to the Com-Who in a Valuation will not mission. Determine the Parsonage or Vicarage by the quantity of Ground that was Pasture, or sown the year immediately preceeding: fince that may prove unequal by the Freak of a contentious Heretor. But they will confider the Total of the Arable and Grass-Rent for seven years backward, and make the Seventh Part of that a Standart for the Rent communibus annis.

7. A Liferenter of Lands who has Right to Stock and Teind, and Farms the Stock, referving the drawing of the Teind, having died before Martinmass after the Teind was drawn; her Executors will have Right to the same, as if she had Laboured and Reaped the whole Harvest. (a) When Lands are set for Third and Teind, and the Master (who is not payed by the Tenent out of the Product of the Corns, but has a like Interest in the ipla corporation in the Interest in the ipla corporation. This Executors have Right to the whole

⁽a) Sir Ja: Stuart's Notes upon Dirleton Title Liferenter.
Third

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Third and Teind, as the Tenents Executors would have Right to the two Parts. (a) A Titular who is in Possession of Teinds, dying before Michaelmas; they will belong to his Executors tanguam sementem secerit. (b) And Teinds were found to pertain to him who has Right at Reaping time, albeit he die before they are led; (c) For Teinds may be disposed of post quam separantur a solo.

(a) Ibid. Title, Third, and Teind. (b) Ibid; Title, Titular. (c) Balfour Prat.

SECT. IV.

Who are lyable to pay Tithes; and who are not?

A Goording to the Canon Law, all Persons of whatever Condition, Rank or Quality, are Subject to the payment of Tithes. (a) Even the Product be no more than is necessary for maintaining the Heretors own Family. (b) 'Tis true among the Jews, no man was lyable to pay the Poor man's Tithe to any that was not poorer than

(a) C. ex transmissa 23. & C. seq: extr: de decimis.

(b) Arg. l. 1. C. qui bonis cedere possunt: C: cum homines

7. Extr: de decim: Zoes: in Decretal: lib: 3: tis: 30. C: 2.

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himself; by which means the poorest sort were Excus'd from this Tithe: But none were Exeem'd from the Tithe of Worship. A Dispensation from the Prince doth not Secure against the payment of Tithes. (a) For his own Goods are Tithable; (b) Altho they be not Subject to Cess or Tribute. (c) And this, me thinks, may partly be the reason why my Lord Stair (d) says the King cannot constitute Feus de novo cum decimis inclusis: because that upon the matter were to make Lands Teind-free. But by the Treaty of Passim'd the Power of granting Exemptions from payment of Tithes.

2. Some Canonists teach that all who paratake, or are bound to partake of Church-Ordinances, are oblig'd for Tithes; that is, as they Explain it, All such as are Baptiz'd, whether Orthodox or Hereticks in their Opinion: But that Heathens or Insidels are not Subject to a Teind-duty. Others maintain the Contrary, for that these ought not to be better dealt with than Christians. (f) Et nemo de sua improbitate commodum consequi debet. Yet they are not clear if Whores should pay Tithes; Because it is written, Thou shalt not bring the bire

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⁽¹⁾ C: tua 25. C: dudum 31. Extr: de decim (b) Gloss: in C: omnes Principes 4. Extr: de majoritate & obelientia, Rebuss: de decim: q: 5: n: 23. q: 8: n: 27 q: 13. 101. Bruneman. de jure Eccles: lib: 2: cap: 6. n: 12. (c) 4: 9. S. 8. st: de Publican: & vestigal (d) Instit lib: 2: it: 8: S: 10. (e) Which began in the year 1552 (f) Arg: 4: st: quod vi aut clam: C: eum qui Benesicium 18: de nebtad in 69

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of a Harlot into the House of thy GOD for any Vow. (a) By the Treaty of Pasaw, it was expreily provided that Roman Catholicks might lawfully claim Tithes belonging to them out of Protestant Lands, and Protestants fuch as are due to them out of Popish Territories, without any let or interruption. (b) Our Law commonly neither allows personal Tithes, nor regards the Quality or Character, or Circumstances of the Persons by, or to whom Tithes

are payable.

3. A Right of Tithes, according to the Ca. non Law, is effectual against all Intromettors. (c) If the Lands be fet in Tack, the Tenent, and not the Master, is conveenable. (d) And if they be partly Laboured by the Master, and partly by the Tenent: Both are to account for the Tithe pro rata. (e) Tithes being Onus Fructuum, non Prædiorum; (f) And it being unreasonable, ut alter alterius odio prægravetur; (g) or that the Deed of the Seller should prejudge the Buyer. (b) So, with us Tithes are not Debita Fundi affecting fingular Successors, or affording a Poinding of the Ground for fuch as were uplifted by their Authors, or others: Even tho the Tithes be valued. (i)

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⁽a) Deuteronom. 23: 18. (b) Carpzov: Jurispr: Consister: Lib: 1: Tit: 8: Def: 137: N: 1 & 2. (c) C: Pastoralis 28: Vers: fructus autem, C: cum non sit 33 Extr: de Decimis. (d) C: Dilecti & C. a nobis 24 eodem: Canis: de Decimis, Cap: 4: N: 2: Zoes: in Decretal: Lib: 3: Tit: 30: N: 24. (e) C: tua mbis 26 Ext: eod. (f) Bruneman de Jure Ecclesiastico, Lib: 2: Cap: 6: N: 7. (g) C: non debet 22 de Reg: Juris in 6. (h) 1: 155: ff: de Reg. Juris (i) February 20: 1662: Earl of Callender againft Monro, Stair Institut; Lib; 2: Tit: 8: 9 32. Nor

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Nor yet is the present Heretor liable, while a Liferenter possesseth. (a) But then we allow Tithes to affect all Intrometters, whether with the separate Teind, or with Stock and Teind jointly. (b) And a Compriser of the Heretable Right of Tithes being infeft, was found liable, albeit he was not Intromettor. and renounced his Comprising. Seing he might have intrometted, and had the legal Remedy of an Action of Spuilzie competent to him against any that debarr'd him. Tenents who pay a joint Duty to their Master for Stock and Tithe, are not liable to any Timlar of Tithes, in so far as they have paid bona fide to their Master: But he, in that case, must answer for the Tithes as an Intrometter. (4) Nor doth a Citation not presently infifted in put Tenents in mala fide: Because of their supposed Rusticity and Dependance on their Masters. (e) Upon which account our Law is very indulgent to Tenents in many Analogous Cases. For payment to their Master after Decreet of General Declarator of his Liferent Escheat before Citation in the Special Declarator, was sustained to liberate them at the Hands of the Donatar. In regard they might be excus'd, for not knowing of their Masters Rebellion, till it was particularly intimate to them by Citation. (f) It was

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⁽a) June 24: 1663: Menzies contra Lord Glenurchie. (b)
Suir Instit: Lib: 2: Tit. 8: N: 1. Lib: 4: Tit: 24: § 1. (c)
Duember 20: 1622: Preston contra the Minister at
(d) Stair Ibid: March 16: 1627: Inglis contra Kirkwood. (e)
Stair Ibid. (f) ult: January 1628: Donatar of Laird of Cleghorns Escheat contra Tenents.

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judg'd sufficient to assoilzie Tenents, that they had paid, though after Citation, a common Duty for Stock and Teind without Distinction on, as they had formerly done for feveral Years. (a) Yea, payment of a joint Duty for one Year only, by Tenents to their Ma fter, as they had been in use to do before to his Author their former Master, even after Inhibition execute particularly against themfelves; was found to have been made bona fa de. (b) And the Reason is obvious, 'cause Tenents who are liable to an undistinguished Duty for Stock and Teind, cannot know how to divide it proportionally, and what they should referve in their own Hands for the Teind. But then, if the Teind were valued apart from the Stock, the Tenents would be liable, and not the Master; unless he introme therewith. (c) This priviledge of Tenents paying a joint Duty to their Master for Stock and Teind, doth only fecure and defend them against Titulars. For they are liable as other to the Minister for his Stipend, when payable out of the Teinds. So, one who had taken from an Heretor for a certain Silver Duty, Tack of the Grass of some Lands, whereof the great and small Tithes, by the Plantation 1618, were made liable to the Minister for proportion of his Stipend, was found oblige to pay to him that proportion; the Minister

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⁽a) March 21: 1628: Murray contra Intrometters will Teinds. (b) December 13: 1627: Hepburn contra Tenents of Fairniflat. (c) Stair: Instit Lib; 2; Tit; 8: § 30: Lib: 4: Tit 24: § 11

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proving, that the Tacksman possest the Land the Year contraverted; and that the small Tithes of the Sheep pastured thereon, and intrometted with by him, did extend to fo much. And that albeit the Tacksman had paid his Duty to the Heretor, who had Right to thefe Teinds before the Ministers Charge. But the Tacksman had his Relief against the Here-

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4. Merchants purchasing, before the Tithe s drawn, a whole Crop for a just price or Onerous Cause, will find themselves liable for the Teind: (b) If the Crop was upon the Ground at the time either Unshorn, or in sheaves and Stucks. And that altho they pay the price before any Diligence is us'd against hem at the Instance of the Teind Master. (c) Because every one is oblig'd to know, that regulariter there is a Tithe due out of the Produce of Lands. Mean time I think, that one who buys so many Bolls of Victual, especially in publick Mercat, or out of the Barn Yard, tho these were the whole Growth of that Year; he would have some plausible pretence to plead an Exemption from payment of a Teind, viz. That he was not bound to know, but the Teind was drawn. And this seems to e my Lord Stairs meaning, when (d) he lays, bat Merchants buying for a price, will not be liable for the Teind. S. Simon Degge (e) distinguish-

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⁽a) February 19: 1629: Kirk contra Gilchrift. (b) Macknzie Instit: Lib: 2: Tit: 10. (c) June 24: 1662: Vernor against Allan. (d) Ibid. (e) Parsons Counsellor, Part 2: Chap: 4.

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eth much to this purpose in the case of Tithes of Wood. Where the Owner of a Wood. fays he, fells the whole together, or parcels it out, and the Buyers cut it, they must pay the Tithe: But if the Owner of the Wood cut it himself, and then sell it by parcels; it seems reasonable, that he should be liable for the Tithe. As for the payment of Tithe-Fish. the same varies much according to the different Customs of Places. An Alledgeance upon Immemorial Custom of payment by the Buyers and Intrometters with Fishes taken and sain within the Isles of Scotland, was indeed fustain. ed relevant to make them them lyable. The like Custom of Merchants being in use past Memory of Man to satisfy for the Teind of Fit bought fresh in Boat-fulls, at the first Hand from Fishers in the Isles where they were taken; was found sufficient to make them answer as Intrometters. (b) This would infinuate, that thefe were free who bought not upon the place where the Fishes were taken, or did not buy them fresh, but at the second Hand, after they had been salted by others.

5. The Pope, by the Canon Law, is not bound to pay Tithes, unless of Real Rent belonging to him before his Advancement to the Infallible Chair. (c) And he assumes a dis-

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⁽²⁾ February 15.1631. Bryce, Semple and Schaw, Tackfmen of the Bishop of the Isles, against Brown. (b) December 13.1664. Bishop of the Isles contra Hamilton Merchant in Edinburgh. (c) A. Monet, Brewiar, cum. Aust. de Decimis, P. 196, 197.

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penfing power as to the payment of Tithes by The Canonists are fore put to it, to reconcile this practice with their Opinion of the Divine Right of Tithes: So that some of 'em are forc'd to acknowledge, that his Holinels can only do fo, when there is a Competency beside for the Ministers maintenance. (a) This dispensing prerogative hath been often exerced in favours of Monks, for procuring and securing their immediate Dependance upon the See of Rome. Pope Paschal 2. exempted all Religious Orders from paying Tithes out of Lands Laboured by themselves, or at their Charges. (b) By which it was thought, at that time, the Parish Churches would suffer no great Loss, Religious Orders being not very numerous, and unable of themselves to Cultivate much Ground. But when they afterward increas'd, the priviledge was restrict? ed by Hadrian 4. to the Ciffertians, Hospitalers, and Templars. And as to the other Religieux, he only declared them free from Tithes of their Gardins, or Animalia quæ nutriuntur, or Novalia, whereof themselves were at the Pains or Expense of Manuring. By Novalia we mean Lands recently Ploughed up, and made Arable, which, time out of mind, had lyen Wild and Unlaboured. (c) Adrians Decree is not extant, but we have it confirmed by Alexander 2. in the Year 1170. (4) But the

⁽a) Barbos. de Officio & Potestate Parochi, Part 3. Cap. 28. § 3. N. 13. (b) Decret. P. 2. Caus. 16. D. 1. C Decimas 47. (c) C. quid per Novale 21 Extr. de Verb. Significat. (d) C, ex parte tua 10 & C: seq. Extr. de Decim.

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Immunity in favours of the Ciffertians, Hospitalers and Templars was thus qualified and explained by Innocent 3. in the General Council of Lateran 1215, that it should not be extended to Acquirenda, but only to such Possessions as they had before that General Council. (a) And they must prove that former Right, if they plead upon it : Nam qui se fundat in tem. pore, bac probare debet. (b) But yet Probation of immemorial Possession is sufficient. (c) And an Alledgeance that the Abbots of Cam. buskennerb had receiv'd a certain Duty out of Glebe-Land yearly for thirty Years together, was found relevant per se, without any other Qualification, to infer that the same was Church-Land. (d)

6. This Exemption from Tithing in favours of these three Orders is personal by the Canon Law, and not communicable to Tenents and Feuars. (e) Yea it is only competent to the Religieux themselves, when they Labour their own Lands: For they pay'd Tithes like other Men, when, as Tenents, they Occupied the Lands of others. (f) This priviledge was once extended here to Lords of Erection, Feuars, and other Singular Successors. And Lands Laboured by an Heretor himself were found

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⁽²⁾ C. pen. Ext. de Decimis. (b) Rebuff. Quest. 14. N. 42. (c) Covarruv. Variar. Resol. Lib: 1: Cap. 17. N. 5. (d) July 5:1626. Laird of Kerse against Mr. Andrew Reid. (e) C licet 11 Ext. de Decimis, Rebuff: de Decim. Quast. 14. N. 48. Canis. de Decim. Cap. 6. N. 10 & 11. Barbos. Collect. Doct. in Lib. 3. Decretal. Tit. 30 C licet 11. N. 1. & 2. (f) C. Dilecti. 8 Ext. de Decim. Canis. Ibid. N. 12, Barbos. Ibid. in d. c. dilecti. N. 1.

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Teind-free, in respect they once pertain'd to the Abbacy of Newbottle, that was of the Ciftertian Order. (a) But then, Immunity of Singuiar Successors is again brought under Debate in a Process just now depending before the Seffion. Sir George Mackenzie (b) is clear, that not only these are personal priviledges, which should not descend to Lords of Erection; but also infinuates, that the Decision betwixt Crawford and Prestongrange has not been well digested. And farther tells, that Temple Lands with us enjoyed not the Exemption from Tithing. A French Author (c) is of Opinion, that this Exemption was never granted, but Salvo Jure of any particular Church that might be concern'd. And cites for this the C. dudum 21. Ext. de Decimis, where the Knights of st. Fohn were condemned to pay Tithes to the Church, altho they had a Gift of Immunity from the King and Queen of Hungary confirmed by the Pope. Nay farther, he afferts, that fuch a priviledge to the Monks was to be no longer effectual after they grew Rich, and the Church had need of the Tithes; and that the Title of Poverty, by which only they could claim a Share of these, ceasing, they return to the Church as the true Owner. But our Law never calls in Question the Heretor of Lands once legally exempted: Nor yet fuch as are inteft cum Decimis Inclusis.

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⁽a) July 15. 1664. Crawford against Laird of Prestongrange. (b) Observ: on the 29. Ast, 11 Parl. F 6. (c) Traite touchant l'Origine des Dixmes, et l'Obligation de les Payer.

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7. A priviledge of Exemption from pay. ment of Tithes, is not to be extended accord. ing to the Canon Law to Novalia afterwards emergent: (a) As being a Singularity introduc'd against the Canons, odious in it self. and prejudicial to another; and consequently to be taken in the most restricted Sense. (b) As for the Canon ex parte tua 27. Extr. de Decimis, in expiscating the Sense whereof, Interpreters are fo nonplust and vex'd; the Argument or Summary would indeed feem to infinuate, that the Concession of a priviledge from paying Tithes, comprehends Novalia: But the Text runs quite in other Terms, and can only be understood as to the Import of a Parochial Right to Tithes founded in the Dil. position of common Law; (c) which is proper ly term'd a Concession. (d) For we commonly say, Frustra Precibus impetratur, quod June communi conceditur.

8. Ministers pay no Tithes for their Glebes; (e) whether design'd by Law, or voluntarily mortified: (f) Nor yet Purchasers of Glebe-Land, unless use of payment be instructed. (g)

9. Having spoken sufficiently to the payment of Tithes: We should next consider what

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⁽a) C. 2. § 1. de Decimis in 6. Rebuff. de Decim. Quaf.
14.N.3. Govarruv Var. Refol. Lib. 1. Cap. 17. N. 13. (b) Arg. 12.
§ 16. ff. ne quid in loco publico, junct. Reg. Odia 15 de Regulis Juris in 6. (c) Barbof. de Officio & Potestate Parochi, Cap. 28. § 3. N. 16. vide Covarruv. Ibid. (d) l. 2. in pr. ff. ne quid in loco publico. (e) Att 62. Parl. 5. Att. 10: Parl. 23: J. 6. (f) June 9: 1676: Burnet contra Gibb. (g) Markenzie Observ: on the 62: Att, 5: Parl: J. 6.

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Action and Proceses of Law is competent about them. And that is either Action extraordinary before the Commission for Plantation of Churches, and Valuation of Teinds: Or ordinary Action before the Lords of Session. We shall begin with the former.

CHAP. IX.

Of Actions before the Commission for Plantation of Churches, and Valuation of Teinds.

HE Commission is a Severeign Court appointed by Act of Parliament, with a Parliamentary Power, to Determine in some Extraordinary Matters: Such as the Modifying and Localling Stipends to Ministers; Valuing and Selling of Tithes; Erecting or Transplanting Churches; Uniting, Annexing, Dividing, and Dismembring Parishes. All these I design to Treat of: But that I may proceed the more distinctly, I shall previously Explain the Nature and Formalities of that Supreme Judicature.

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SECTION I.

The Nature of the Commission; and the Form of Process before that Court.

FOR Determining some necessary Points, that were thought above the Jurisdicion of Ordinary Judges, and yet frequently fell out to be Decided while no Parliament was fitting: Commissioners have been appointed by the Parliament, from time to time, for Judging in fuch cases, with a Parliamentary Power, and to continue until a new Their Decreets cannot be Set were named. Reduced or Sufpended by the Lords of Seffion; because of the Paramount Authority, they are clothed with. (a) But the Commission 1661, was expresly Impowered to alter and Annull all unjust and exorbitant Decreets pronounced by the Commission in the. years 1649, and 1650, in Favours of Minifters for their Stipends, or for Dividing, Uniting, Annexing, and building of Churches, (b) And they have ever been in use to sustain themselves Judges competent to Reduce all Decreets pronounced by themselves, or by former Commissions.

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⁽a) Act 39. Part. 11. Ja. 6. (b) Act 61. Part. 1. Ch. 2.

have but one Diet, and may be Executed by any Person, as Sheriff in that part, as well as by a Messenger and upon such an Execution, the Party if Apprehended personally will be holden as Confest. (a) All Diets are with continuation of Days. No Action fleeps here, because of the uncertain sitting of the Judges. Persons called only pro interesse dying pendente processi; the Action needs not to be transferred against their Heirs. (b) It was Ordained by the Commission, 4th April 1627, that all Procurators compearing before them hould have written Mandats, Registrat in the Commission Books: but this has gone in de uetude. Nevertheless Decreet given upon an Advocat's confent, not Subscrib'd by him is null. (c)

thing singular, and now much altered from what it was. Formerly, though a conjunct Probation was oftenallowed; (as when the Heretor had Tacks of his own Teinds for payment of a Silver Duty, (d) Yet in many cases, one of the Parties was allowed the Prerogative of Probation, that it was preferred to the leading of Probation, which they much contended for. The Titular or Tacksfman us'd to get it upon instructing Possession for seven years of sisteen before the year 1628, or Immemorial Possession of drawing the

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⁽a) 10 July 1643. (b) 29 January 1673. Cockburn of Ryslaw contra E. of Hume. (c) July 20. 1664. (d) Mackenzie Instit. lib. 2. tit. 19. Observ. upon the 19. Act, 1 Parl. Ch. 3.

Teind; or twenty years Possession of uplisting Rental Bolls of a certain Quantity and Quality. (a) When the Titular had the fole Probation, the Heretor could not lead any Probation of the Stock, except for Certification. That is where a Diet was affign'd to the Titular having the Prerogative, for proving the drawn Teind, the Heretor was ordinarly allowed to take the same day to prove the Stock with Certification, that if the Titular did fuccumb in his Probation, the Heretors Probation of the Stock should be admitted. Which upon the event of the Titulars failing to prove, was accordinly done; and the 4th part Declared to be the Teind whereof he got down a fifth as the Kings Ease. And the Titular was secluded from all manner of afterprobation. (b) So a Titular claiming the Prerogative upon seven years Possession of fifteen before the 1628, got a day for proving thereof; and the Heretor that same day to prove the Value of his Teind, in case the Titular did not prove his Alleadgeance of Poffession; and the Titular having failed to make his point good: The Lords declared conform to the Heretors probation of the Value. (c) In some cases the Commissioners found themselves Impowered to moderate the quantity of Teind, proven by the Titular as having the Prerogative. (d)

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⁽a) Ibid. (b) 24 February 1643. (c) 29 January 1673. Cockburn of Ryslaw against the E. of Hume. (d) 19 January 1631.

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4. But now in all cases the Heretor has a oint Probation. (a) He may refer the Worth of the Teind to the Titulars Oath before Witnesses be received, but not after: (b) And the Titular may prove the Teind Value by his Oath. (c) If the Heretor has given his Oath of Verity, the Titular can use other Probation; only he may get him Re-examined upon new Interrogators. (d) But though Stock and Teind, great and small be jointly Valued by the Heretors Oath; yet if the Vicarage pertain to the Minister, he may prove the Value on't otherways if he please. And the Quantity so proven will be deduced off the fifth part contained in the Deponents Oath, (e) All conjunct Probation of Stock and Teind not bearing the prefent, as well as the constant Rent in time coming is null. (f) Tho Parties cited before the Commission have but one diet for their Compearance; two diets are allowed for probation. But if the Term be circumduced against a Party for not taking out, and Executing the first Diligence, he will not get a second. (g) However Diligence may be Extracted after elapsing of the Diet before the Term be circumduced at the Instance of the other Party. (b)

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⁽a) W. and M. Parl. I. Seff. 2. cap. 30. (b) 24 Feabruary 1643. (c) 14 January, and 29 April 1629. (d) 27 July 1634. (e) 27 July 1634. (f) January 19. 1631. (g) February 20. 1643 (h) November 22. 1634.

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and to mark the Members of every Sederal and to insert their Names in Decreets: But the hath gone in deluctude. A Decreet of Conmission uses not to be Extracted till anothe Diet of Sederant be elapsed after pronouncing And if within that time any reclaiming Bill be offered, that Bill must also be first read be

fore Decreet is given out.

cerning the Nature of the Commission Court and the Form of Process before it in general the peculiar steps of Formality in particular Actions, shall be Observed in their proper places. Our next Business is to consider the Method observed in modelling of Minister Stipends, before we touch upon Valuation of Teinds: because by the Submissions, Decreets Arbitral and several Acts of Parliament, Ministers are to be provided before the Heretor have Liberty to Value his Teinds.

SECT. II.

'Actions for Modifying and Localling Sting pends to Ministers.

all Benefices of Cure under Prelacies, to be provided in favours of able and qualified Ministers. By vertue whereof they claim'd such Benefices as were not erected into Temporal Lordships and Baronies, or affected

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ted and exhausted by Tacks and other Secular Titles. But fince few of these could be found, that excellent Statute took little effect. and Maintenance of Ministers turn'd mostly into modified Stipends. Whereof the Quota was determin'd by the 2.AH, 22.Par. 7.6. to be five Chalders of Victual, or Five Hundred Merks. But the Commission of Surrender in the year 1627, appointed Eight Hundred Merks, or Eight Chalders of Victual, as the lowest Stipend for a Minister; Except particular Reasons occur for going beneath that Which was ratified by the 8th. proportion. and 19th. Acts of the Parliament 1622. And the confideration of these Reasons referr'd to the Commissioners for Plantation, &c. the Strain of that 8th. Act, it would feem they could only modifie a leffer Quantity for the Minister's maintenance, where Valuations of the Teinds were already led: Because before a Valuation, ic cannot be known if there be more free Teind in the Parish as will amount to eight Chalders of Victual. But yet where it is notour that the meannels of the Parill, and penury of the Teind cannot bear fo much, the Commission is in use to modifie less Stipends. (a) Which they likeways do, even where there is plenty of Teind, if the Lands be Feued, cum decimis inclusis.

2. Ministers in Mensal Churches under Episcopacy had no Decreets of Locality, nor the benefit of the high Stipend provided by the

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⁽a) Mackenzie Observ: on the 8. Act, Parl: 1633. ВЬ

Parliament 1633. They behov'd to hold themselves content with what the Bishop pleafed to fettle upon them for a mean of Sublift. ance. But these by the 20. Act, Parl. 1641, wereor. dain'd to have the full Quantity of eight Chalders of Victual, or Eight Hundred Merksout of the Tithes of their own Parishes; failing whereof, out of the Teinds of other Churches of the Bishoprick: And were provided accordingly. The Ministers in mensal Churches were depriv'd of these Stipends at the return. ing of Bishops, and reduc'd to their wonted State of Dependance upon the Liberality of the Ordinary. But now when Prelates are again turn'd out, all Ministers are upon the same foot of Provision, and have the like claim to the legal Quota of eight Chalders of Victual or Eight Hundred Merks; where it can be had out of the free Teind of the Parish. when Ministers in menfal Churches pursue for a modification of Stipend, they must call the Officers of State, because the Bishops Teinds are in the Oueens hand. And in fuch Cafes the Commission used not to take upon them to modifie any Stipend out of these Teinds! But only to recommend to the Lords of Thefaury, to procure a Gift from Her Majesty in favours of the Minister. As was done to the Minister of Forgondennie, and to the Minister of the West Church of Edinburgh, &c.

3. This determin'd proportion of eight Chalders of Victual of Stipend is regulariter, the minimum quod sic; But the Commission is not restrain'd from exceeding the same, where

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The eight Chalders were to be reckoned by
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4. Sometimes the Commission only modifies a Ministers Stipend, which is called a Decreet of Modification: Sometimes again they not only modifie, but also divide and proporion the Stipend among the Heretors, and hat we term a Decreet of Locality. After a new Church is appointed in a Parich, there an be no Stipend modified till the Church is built, and an actual Minister presented to it. (1) The Minister's Stipend should be modifed out of the Teinds of the Parish where he erves the Cure. (d) But yet where a Minifer is sufficiently provided, the Commission iles sometimes to appropriate the Free-teind of his Parish for making up a competency to the Minister of the adjacent Parish: (e) If the Teinds thereof be exhausted. (f) Or oherways no Augmentation should be granted out of other Parishes. (g) The Commission peing impower'd to take off from larger and add to lesser Parishes: They found that where lands are disjoin'd from one and annex'd to

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⁽a) 27. February 1666. Mr. Thomas Thores Minister at against his Parishioners. (b) 20. February 1643. (c) 17. July 1643. (d) Act 17. Parl: 1633. Act 28 Parl: 1. Ja: 7. Act 22. Sess: 2. Ibid: Act 30. Parl: 1. Sess: 2. W. and M. (e) Mackenzie Observ: on the 17. Act, Parl: 1633. (f) 10 February 1669. Reid Minister of North-Leith against be Minister and Heretors of St. Cuthberts. (g) 19 February 1662. Lord Cochran against Greenock and Taylor his Minister.

another Parish, whereof the Teinds were a part of the Stipend of the Minister of the former Parish; These Teinds shall accresce to the Incumbent of that Parish to which the Annexa. tion is made, and the other's Loss be supply'd out of the Free-teind of his own Parish. (4) But if that be exhausted, the Lands dissolvid must pay to the former Minister as before:(b) Though quoad curam animarum, they be within anothers Parish. And in this Sense we are to understand the A& of Commission the 21d. of March 1621, whereby the difmembring of any part of a Parish, is not to prejudge the Church from which it is dismembred; but the Teind to be lyable to the Stipend of the Minister thereof as formerly. Teinds are so far affectable for Ministers Stipends, that fourteen Bolls of Victual being payable to a Minister out of some valued Aikers by Feuars, the Teind-master was found oblig'd to allow yearly to them their respective proportions of the price of the faid fourteen Bolls, liquidate by Who, in case that exceeded the valued Duty of the Aikers, were allowed Retention of the Superplus, in subsequent years, when it should happen to fall short, and be within the valued Duty. (c)

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⁽a) 20. February 1643. 7. February 1666. Fogo Minister At Grifan against his Parishioners: 28. July 1669. Pringle Minister at Fogo against (b) 19. February 1662. Earl of Kinghorn against Walker Minister at Auchtertoul. (c) 26. February 1668. Mackubine and others against the Minist of Jedburgh.

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fied Stipend, are sometimes entered into by the Minister and those having Right to the Teinds of the Parish: Which they offer to the Commission in order to be ratified. done (a) by the Earl of Glencairn Patron of the Church of Kilmaures, who upon a Supplication got the Commissions Approbation of a Contract past betwixt him and Mr. Robert Lawrie Dean of Edinburgh, Titular of the Teinds of that Parish, whereby seven Chalders of Victual and 100 Merks of Money was settled for the Stipend. Mr. Lawrence Skinner Minister of Brichen obtain'd also an Approbation of an Agreement betwixt the Heretors and him, concerning an Augmentation. (b) And many other Transactions of that nature have been ratified by the Commission. then an Agreement made with a Minister, whereby he accepted a certain Quantity of Stipend in satisfaction of all that he could claim either for Parsonage or Vicarage-teind, was found not to debar him from feeking an Augmentation: For that he could not prejudge his Successors. (c)

6. Besides the Ministers Stipend, there is ordinarly a certain Sum modified for Communion Elements, which is made more or less according to the Extent of the Parish and Number of Communicants therein, but seldom execeds Fifty Merks. So much for Modifications

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⁽a) February 25: 1663. (b) July 3: 1667. (c) Fe-bruary 21: 1666: Mr: Thomas Thores Minister at against his Parisbioners.

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7. The time was, when the Titular might Allocat any persons Teinds he pleas'd, to. wards the maintenance of a Minister that had no fettl'd Provision, and so elude the Priviledge of Buying: (a) Albeit, where the Minister had some Provision, though small, the Titular behov'd to cast the Augmentation proportionally on the whole Teinds of the Parish. And he could not assign the Teinds of one Pa. rish to the Minister of another, (c) But now Patrons, Titulars, or Tacksmen, after Citation at the Instance of an Heretor pursuing a Sale of his Teinds, cannot Allocat the Purfuers Teinds folely, but only proportionally with the rest of the Teinds of the Parish: Only they may except the Teinds of their own Lands, where there is Sufficiency of Teind beside. (d) Yet a Patron having conveyed to an Heretor all Right which he had, or should thereafter acquire to the Tithes of that Heretors Land: It was found, that the Patron, notwithstanding the Supervenient Actof Parliament 1693, (e) could no otherways burden these Tithes with an Allocation, than pro rata, with the rest of the Parish: Without Exception of the Teinds of his own Propertv. (f) Because the Right acquired to the Patron, by the Act 1690, was found (g) to accresce to the Heretor: It were absurd to

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⁽a) February 9: 1631: February 17: 1645: Act 61: Parl: 1: Ch: 2d. (b) Mackenzie Observ: on the 17: Act, Parl: 1633. (c) July 14: 1634. (d) W: and M: Parl: 1: Seff: 4: Cap: 24. (e) d: Act 24. (f) December 3: 1698: Allardice of that I.k against the Viscount of Arbuthnet. (g) Inter eo dem. allow

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allow him, who cannot take the Superplus Teinds to himself, to assign them to the Minister. Seing that would be indirectly Fraudem facere Contractui: For qui facit per alium, facit per se; and the Allocation to the Minister, for saving his own Tithes pro tanto, is the same thing upon the matter, as if the Patron himself should

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8. The Order observ'd in imposing of a Ministers Stipend, or Augmentation on the Parish, is this; While there is any free Teind in the Titulars Hand, he is oblig'd to relieve the Heretors, who have bought their own Teinds from him, of their proportion of the Miniflers provision: Though a Tacksman having Right to other Mens Teinds would not find himself oblig'd to any such Relief. (a) An Heretor having alledg'd, that there was free Teind in the Titulars Hand, and the Titular denied that he had any; the Lords referved to the Heretor Action of Relief against the Titular as accords. (b) Teinds, even after the Heretor has bought them, are liable to be evicted by the Minister, if there be no free Teind in the Titulars Hand. (c) Tacks. men of their own Teinds are not liable, so long as the Titular has free Teind of other Mens Land undispon'd. (d) And the Tack Duty payed to the Titular must go to

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⁽a) January 27: 1635: Earl of Marr centra Laird of Glenkindie. (b) July 29: 1668: William Duncan Minister at Easter Kilpatrick against Laird of Cloberhill and other Parishioners. (c) July 28: 1634: Parish of Selkirk and the Earl of Linlithgow. (d) February 8: 1643.

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the Ministers provision, before the Heretor as Tacksman be burden'd. (a) Though it would seem reasonable, that where a Ministers Stipend is cast by a Locality upon the Teind of any Parish, it should be payed in the same Species of Victual or Money to the Minister, as it is payed to the Titular or Heretor; yet, by the constant Practick of the Commission, the Chalder or Boll of Teind is ordinarly burden'd with so much Money to make up the proportion of almost every Stipend: There being sew which doth not consist of both Money and Victual.

9. A Ministers Decreet of Provision and Locality where there was plenty of free Teind us'd to be drawn back by the Commission to the Date of Summons. (b) Heretors were decern'd for an Augmentation to a Minister who preach'd in a Language they understood not. (c) Where, by a mistaken or wrong Calcul, there was more than the due Quantity assign'd to the Minister out of any Mans Teinds according to the proportion of his Valuation; the Commission was impower'd, by the 30 Act 1641, to rectify the same, without prejudice to the Ministers possession, till his Stipend was made up out of other Teinds of the Parish. A Decreet of Locality was reduced upon these Reasons, That, before the Augmentation, the Minister had Nine Chalders of

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^{(2) 18.} July 1636: February 15: 1643. (b) January 25: 1665: Row Minister at the United Kirks Monivaird and Strowan. (c) January 25: 1671: Strachan Minister of Weem against Laird of Menzies and others.

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Vidual, and the Heretors and Tackimen of the Teinds were not called thereto. 2. Those called as Heretors were never infeft, and fo could not be decern'd personally in any part of the Stipend. 3. Where Heretors have free Teind in the Parish, no Tacksman's Teinds bould be allocat to the Minister for the Years of his Tack, or for the time he possesses after it is out per Tacitam Relocationem, without a Legal Interruption. (a) A Decreet was reduc'd pro futuro upon this Ground, that the proportion decern'd against an Heretor for the Ministers Stipend not only exceeded the Valuation of his Teind, but also was converted from Money to Victual. But the Decreet was allowed to stand as to bygones. (b)

10. When Ministers purlue Localities or Augmentations of their Stipends against the Heretors, the Titular of the Tithes must be call'd. Therefore no Process was sustain'd at the Instance of Mr. Francis Pearson Minister at Kirkmichael for an Augmentation; because the Earl of Tweddale Titular of the Teinds of the Parish was not cited; (c) A Bishops Declaration bearing, that a certain person was Minister at fuch a Kirk, and his Service there notorium, was sustained to afford Action to the Minister for an Augmentation, without production of his presentation, or any other Title. (4) Mr. Patrick Simson Minister at Logie hav-

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⁽²⁾ January 25: 1665: Moncrief of Tippermalloch contra Minister of Methoin. (b) December 4: 1661: Brown of Thornidikes contra Vetch Minister at Westruther. (c) June 30: 1669. (d) Febr: 19: 1673: Mr: Francis Masson Minister at Kirkmichael.

ing obtained an Augmentation, which was laid upon the Earl of Ethies Tack Dury pay. able to the Masters of the Colledge of St. Andrews, who are Titulars of the Tithes of the Parish: It was declared in the Decreet, that the Colledge should pay the Augmentarion when the Tack expired, if not renewed, (a) Ministers use sometimes, for the more Expedition and Dispatch, to give in Rentals of the Stock and Teind of the Parish, offering to prove the same to be true and genuine by the Defenders Oaths. Conform to which, the Stipend is modified and localled upon them, if they be holden as confest. A Minifter pursuing a Locality upon the Teinds of his Parish, and having given in a Rental of the whole, which he referr'd to the Oaths of the Titulars and Heretors, and craving they might be holden as confest, and the Term circum duc'd against them for not compearing to depone: It was alledged for one of the Titulars, that the Heretors did, by Collusion with the Pursuer, industriously absent to conceal their Rents; and therefore crav'd a Diligence for citing them. Which being granted, they yet not compearing, the Minister insisted, that he might suffer no farther Delay in the settling of his Stipend. Upon which it was crav'd for the foresaid Titular, and granted, that the Decreet to be pronounced in favours of the Minister should be extracted with this Clause insert; Without prejudice to him to pursue the He

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⁽a) February 25: 1663.

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retors for the Superplus Worth of their Teinds more than is contained and allocat in the Decreet. (a) Mr. William Skinner Minister at the United Kirks of Logieleaf and Innergellie having obtained a Decreet of Augmentation and Locality: Sir Alexander Wedderburn of Blackness protested for Relief off the persons from whom he bought the Lands affected with the Mini-

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11. 'Tis the Business of the Commission, to provide Ministers out of the Tithes of their own Parishes. But Ministers within Burgh. who have no Landwart Parish, or second Ministers, where the Tithes are exhausted by Stipends to the first; are either provided by Mortifications and Gifts, or a Voluntar Contribution of the Inhabitants, or by an Annuity imposed on the House Rents by Act of Par-The Town of Edinburgh have Warliament. rand by Authority of Parliament for impofing, towards the payment of their Ministers Stipends, an Annuity upon the Inhabitants, except the Colledge of Justice, proportion'd to the Rents they pay for their Houses. Which Annuity is Six per Cent. of the valued Rent of each House that is inhabited and posses'd. And the Valuation is yearly taken up by Stent-Masters chosen by the Council of the Burgh.

12. I advance from discoursing of Ministers Stipends, to treat, as was propounded, the Valuation of Tithes. And because some Tithes can on-

retors

⁽a) July 16: 1673: Douglas Minister at Longformacus asainst his Parishioners. (b) February 7: 1666.

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ly be valued, others may be valued and bought fimple Valuations shall be first handled, and then Valuations and Sale.

SECT. III.

Concerning Actions of Valuation of Tithes.

I to Heretors and others to wait till their Tithes were draw'n, the Parliament thought fit, for preventing Abuses committed in the Leading of Tithes, to introduce the Benefit of a Valuation. That Heretors and others might freely intromet with their Tithes as well as the Stock; and the Tithe Masters Interest be compens'd by an equivalent valued Duty.

2. Tithes are valued at the fifth part of the constant Rent, when set with the Stock for a joynt Duty. And a Valuation of such Tithes was reduc'd for being above the fifth part of the Rent. (a) When distinct Duties are pay'd for Stock and Tithe, they are valued a fish part down of the True Worth and Avail, according to the King's ease. (b) The fifth part of Rent pay'd for Stock and Tithes, is the same with the sourth part of the Rent of the Stock: But a probation of the Rent of the Stock being led, and a distinct probation of the yearly

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⁽a) 29. July 1664 E. of Ethie against the E. of Panmure and others. (b) Att 17. Parl: 1. Ch: 1.

(397)

value of the Vicarage-Tithes, the Parsonage Tithes were not found to be the fourth part of the intire Rent of the Stock, but only the fourth of what remain'd after deduction of a Stock corresponding to the Vicarage-Tithes. But then the Vicarage was valued according to the full Rent, tho separately proven, without any allowance for the King's eafe, in regard of the foresaid Deduction. (a) The Earl of Kingborn obtained a Decreet valuing the Stock and Parsonage-Tithes of the Barony of Balbelvie and Balmedie, against Mr. David Lind-(ay Parson of Balbelvie in absence, bearing a Refervation in favours of the Pursuer, to claim Deduction out of the faid Valuation, of 2 Stock corresponding to the value of the Vicarage drawn by the Minister. (b)

In the part of the Parlonage should be valued to a sister part of the true Worth of his Tithes. (c) The Vicarage-Tithes which are Local and Variable, must be rated according to use of payment, and the Parlonage should be valued to a sister part of the Corn-rent. That this sister may be the more justly and equally stated, a Calcule useth to be made of seven preceeding years Rent, and the seventh part of the Total is reckoned the true Rent communibus annis. Of Which

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⁽²⁾ March 4! 1702. Brodie of Miltoun against the Officers of State, Ministers of Elgine and others. (b) 23. January 1663. (c) Acts 17, and 19. Parl. 1. Ch: 1. Act 28. Parl: 1. Ja: 7. Act 22. Sess: 2. Ibid. Act 30. Sess: 2. Parl; W. & M.

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the fifth is the Legal Value put upon the Par-Sonage Tithes. But then some Deduction uf. eth to be given to the Heretor upon the account of industrial and costly Improvements of the Ground, by Liming, Dunging, or 0, therways, &c. In a Process of Valuation at the Instance of Some Heretors within the Parish of Dumbar, against the Earl of Roxburgh, they got an Ease of so much of the proven Rent. as the Tenents deponed they would have pay'd less, had it not been for the benefit of Sea, ware, which their Masters procur'd from the Town of Dumbar. And the constant yearly worth of each Acre of the Barony of Broughtour in Stock and Tithe, was found to be one ly fix Firlots of Bear; Albeit it was proven that these Acres pay'd eleven Firlots, with the benefit of the Town of Edinburghs Muck: In regard the Witnesses gave Evidence, that without the faid Dung, the value of the Acre would not have exceeded fix. (a) Albeit it was alledged that the Soiling and Dunging of Ground, being the ordinary Expence of Labouring, could not be deduc'd off the proven Rent: Seing the Lands of Broughtoun always had, and will have the advantage of Edinburgh. muck, by reason they ly so near to the Town. And if any Deduction were allowed, it should at most be only the charges of carrying three or four Score of Loads of Muck once in three years: The Dunging of Land being far from

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⁽²⁾ December 28. 1698. The Administrators and Thesaurer of Heriots Hospital against the Officers of State.

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the case of Liming, which is an extraordinary Expence to the Heretor or Tenent, in buying and bringing home the Lime. For to this it was Answered, that the Dunging of Lands about Edinburgh, is no less chargeable than Liming in other parts. Since the Town of Edinburghs Muck is bought at so much for the Cartful, and considerable gain might be made by the Servants and Horses who carry the same, if they were imployed in transporting of Goods betwixt Leith and Edinburgh.

4. February 28. 1628. The Commission raissed a Letter from the King declaring old
Rentals to stand for a Valuation where
the Parties consent, or do not oppose it.
And it was found relevant against a Valuation of Rental bolls, that the Quantity of them
was within the worth of the Teind, if ipsa

corpora were drawn. (a)

5. Valuations are sustain'd not only at the instance of Heretors, but also of Ministers, or Titulars, or Tacks-men. And all these must be cited when the Heretor pursues. (b) There was sound necessity of calling the Minister, even when he was aliunde provided. (c) Parsonage Tithes were valued against a Minister who was Titular, with this Provision, That the Minister should not be prejudged of his modified Stipend and the Vicarage Tithes; Nor the other Heretors burdened above their

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⁽²⁾ January 27. 1669. Stuart of Gairntully against Nairn of Strathurd. (b) Mackenzie Instit: lib: 2, tit: 10. (c) February 1, 1671, Lady Purveshaugh.

(400)

Locality at that time. (a) When the Parish Church is Vacant, the Moderator of the Pressibytry, and the Agent of the Church, must be cited. An Heretor was found to have Interest to seek his Tithes valued, even against a Tacksman in possession of the Lands, by vertue of a Proper Wadset: But the benefit of the Valuation accresced to the Wadsetter, during the not Redemption. (b) For when a Valuation is led against a Tacksman, he gets the valued Duty during the Tack, and the Titular thereafter. A Valuation, tho raised by an Apparent Heir before he was insest, was sustained upon production of his Insestment. (c)

6. Tacks of other Mens Tithes may certainly be valued. But if it be asked, Whether an Heretor having a Tack of his own Tithes, can get them to be valued while the Tack is standing? One would think, if the Tack was made since the allowing of Judicial Valuations by Law, he can only pursue a Valuation to take effect at the Ish of the Tack. Because the ingaging for a certain Tack-duty, is a tacit passing from the present Benefit of a Valuation. But if the Tack was entered into before Actions for Valuation were competent; Nothing seems to hinder the Heretor from obtaining his Tithes effectually valued, so as to be lyable only for the valued Duty during

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kart Minister at Dunsyre. (b) 22. June 1636. (c) 29 June 1673: Sir James Cockburn of Ryslam against the Earl of Hume.

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the Tack: Seing he can never be understood to renounce, by taking a Tack of his Tithes,

the benefit of a Supervenient Law.

7. As in a Process of Valuation at the Infance of the Heretor; the Titular Tacksmen & Minister should be called: So must he, when any of these Pursue; that he may Object against the Witnesses upon the common Grounds of Law, fuch as partial Counsel, Deeds of Corruption, Blood-relation, Dependence on the Pursuers, and the like. A Decreet of Valuaion was Reduced for not citing the Heretor, albeit it mention'd him to have consented a and his Tenents had payed the valued Duty conform, for the space of 40 years: since no Writ under the Heretors hand was produc'd to instruct the Consent, and bind it uon him. And tho in improbation of Decreets. Certification against Minuts of Process, or Executions, will not be granted after many rears; in respect such small Papers are easily oft: Yet Writs subscriv'd by Parties must always be made furthcoming. (a) Not only hult the Heretor be called in a Valuation at mothers instance; but also Comprysers, if hey be in Possession, otherways not. (b) But fuch as are only called pro interese, dying endente processu; the Action needs not be ransferred against their Heirs. (c)

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⁽a) 19 February 1673 Lord Craigie against the Lords Cathears and Bargany. (b) 29 January 1673: Cockburn of Kyslam against the Earl of Hume. (c) Inter cosdem.

8. An Heretor or Liferenter by Infeftment, during the Dependence of a Process for Valuation of their Teinds, may get the Leading of them (if they apply for it by a Bill to the Commission) upon finding Caution to pay at theevent conform to the Valuation to be led. (a) Albeit by the Ast 17, Par. 1612. Thefe are to have the Leading and Drawing of their own Teinds, the same being first Valued: Which Clause would feem to Suspend the leading till the close of the Valuation. This Priviledge of Leading during the Dependence, was allowed to one who payed formerly Rental Bolls, and whose Tithes had never been drawn (b) but not to Rentalers or Tenents: (c) these not being Infest. Yet an Heretor no Infeft may claim the Benefit to lead his own Tithes, if he instruct a sufficient Title for Infeftment; and shew that he is not in morn to compleat his Right, (d) Now a Warrand for Leading Tithes obtain'd upon pretence of a depending Action for Valuation, falls by the Defenders taking out a Protestation for no infifting. (e)

ground of Debate, that all Parties concerns do agrees to a Valuation of Consent; and then offer the same to be Ratified by the Commission. So two Contracts of Valuation one betwixt the Earl of Glencairn, and Mr

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⁽a) July 14: 1630. Junet. November 30. 1631. (b) 1
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(403) Robert Laurie Dean of Edinburgh, Titular of the

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Tithes of the Parish of Kilmares; and another betwixt the faid Titular and the Earl of Eglinge was approven by the Commission. (a) and several Contracts of Valuation betwixt the Duke and Dutches of Buccleugh and other Persons, were Ratified 20 December 1665.

10. Formerly there could be no Valuation Tithes whereof the Clergy were in Poffeffon by drawing ip/a corpora, or uplifting of Rental Bolls the time of their Submission. (b) and therefore Valuations of fuch were null. (1) But this Priviledge King Charles the first whis Milfive Letter, (d) Declared to be meerly personal in Favours of Churchmen nd not competent to their Laick Tacksmen: during whose Tack the Heretor might have ad his Tithes Valued, without prejudice to he Ecclesiastick Setter to injoy the same after spiring of the Tacks as formerly. Accoringly (e) a Valuation was sustain'd to fames Hamilton of the Tithes of the Lands Hetberwick against the Earl of Roxburgh he Bishops Tacksman. Tho upon this acount probably Churchmen got less Tack-duies and Graffums from Laicks. But now all lithes are allowed to be valued: (f) Exept decime incluse Feued with the Stock, and Confirmed before the year 1587. (g) Such

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being

⁽a) 25 February 1663. (b) Act 17. and 19. Par. 1633. (c) Act 9. Par. 1. Seff. 2. Ch. 2. (d) May 9 1634. (e) February 1679. (f) Act 30. Seff. 2. Par. W. and M. (g) January 23. 163 1.

(404)

being look'd upon in our Law as no Tithes and not affectable by Ministers. Nothing can be valued but the Free Tithe, over and above what is allocat for maintenance of Ministers, and other Pious uses. And the Heretor is only lyable to the Titular or Tacks. man for the valued Duty of that Superplus. (a)

II. The Teind-master after Valuation is not bound to pass from his former Right or Possession in Favours of the Heretor, or other Obtainer the Valuation, till he get real Security by Infeftment for the valued Bolls, or Silver-duty (b) But this I never knew required. And the Reason possibly is, for fear of Provoking the Heretor not to rest in the Valuation, bu to purfue a Sale; which certainly he would chuse to do, rather than give Infeftment in his Lands for the Titulars valued Duty. The Term of payment of this valued Duty is be twixt Tule and Gandlemass: (c) and valu ed Bolls are to be delivered according to Lin lithgow Measure. (d)

12. The Commission is impowered to Rectify former unequal Vaulations: Bu fuch as were lawfully led against all Partie having Interest, and allowed, could not be draw'n in question upon pretence of enon lesion at the Instance of the Minister not be ing Titular, or at the Instance of the King

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⁽a) Act 17. and 19. Parl. 1633. (b) August 6, 1630. At Commission Junet. Act 17. Par. 1633. Mackenzie Instit. lib. vit. 10. (c) 23 March 1631. (d) 29. May 1627.

Advocat for his Annuity; unless Collusion betwixt the Titular and Heretor, or the Procurator-fiscal and them, be instructed; which is presumed præsumptione juris & de jure, when the Valuation is led with a diminution of the third of the current Rent, to be proven by the Parties Oaths. (a) Albeit ordinary Venditions with us are not reduceable upon the Head of Lesion ultra dimidium. But the Clause in the Acts of Parliament, making this Collusion probable by Oath of Parties, was not found Exclusive of other probation. (b) A Valuation of the Tithes of the Landwart Parish of Perth was reduc'd at the Inflance of the Magistrats as Patrons of the Church, and Titulars of the Tithes, against the Heretors, upon this Reason, that it was a Third within the real worth of the Tithes, the time of deducing thereof. (c) A Reduction of a Valuation of Tithes is sustain'd at the Instance of the Heretor as well as Titulars, or Ministers; if the Valuation craved to be reduc'd was not carried on at the Heretors own Instance. (d) Witnesses adduced in a Process of Valuation were Ordained to be Reexamined, because they had not distinguished betwixt Infield and Outfield Acres. (e).

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SECT. IV.

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⁽a) Att 19. Par. 1. Ch. 1. Att 61. Par. 1: Att 15. Par. 2. Seff. 3. Ch. 2. Att 28. Par. 1. Ja. 7. Att 22. Seff. 2. Ibid. Att 30. Seff. 2. Par. W and M. (b) January 1672. Meldrum against Tolquhon. (c) February 5. 1662. (d) 19 February 1673. (e) 24 July 1667. William Chirnlaw against E. of Hume.

SECT. IV.

Concerning Actions of Valuation and Sale of Tithes.

BY King Charles the first's Decreet Arbitral, and the 17 Act, Par. 1622. Tithes being Valued, may be bought at Nine years purchase: And if they consist in Victual, or other Goods, the same is to be reduc'd into Money, according to the Rates of that part of the Country where they are payable; and temporary or inferior Right should be proportionably cheaper according to the continuance and quality of 'em. A Tack of Tithes was once Ordained to be Sold to the Heretor at Eight years purchase : and in case the Tacksman acquired the Heretable Right of 'em before expiring of the Tack, the Heretor was Ordained to give him another years Purchase for the same. (a) But now the method taken with Tacksmen in a Sale of Tithes, is to value the Tithes, and Stock the valued Duty in a principal Sum, answering to Nine years purchase. The Heretor is obliged to give Security to the Tacksman for the Annualrent thereof during the course of his Tack; and to the Titular for the Principal

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⁽a) 13 July 1664. Cockburn of that Ilk against Hume of Blaccadder.

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after expiring of the temporary Right. Tho Nine years purchase be the fix'd Heretable price of ordinary Tithes: Yet those that were given to Patrons, as not having been Heretably Disponed, in lieu of the Right of presenting Ministers taken from them, are redeemable by the Heretors at six years puchase after a Valuation. (a) The reason of the Disparity is obvious; Patrons came easily by these Tithes, and therefore should the more

eafily part with 'em.

2. Those who buy their own Tithes are only obliged to pay for fo much as is free Tithe, over and above what is appropriat to Ministers and pious Uses: But must relieve the Titulars of the Kings Annuity and Mini-Hers Stipends pro rata. (b) Deduction of the ordinary Price should be given to Heretors having already standing Tacks, or other Rights of their Tithes, according to the Nature and duration thereof. (c) But yet one who had Tacks of his own Tithes pursuing a Sale, was Decern'd to pay the whole Price to the Titular at the Ish of the Tack. (d) The Price of Tithes should be payed at Whitfunday preceeding the Cropt, with Annualrent from that Term. (e)

3. By an Old Practique of the Commission, (f) It was found that the Titular might put the Heretor after Valuation to condescend

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⁽a) Act 23. Seff. 2. Par. W. and M. (b) Decreet Arbitral. (c) Ibid. (d) 27 February 1637. (e) 30 November 1631. (f) 23 March 1631.

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whether or not he would buy; and if he refus'd, he and his Successors were to be cut off from the Benefit of Purchasing these Tithes thereafter. But this I never found Observed.

4. Heretors formerly us'd also to be Excluded from acquiring their Tithes, if they imbrac'd not the Benefit within two or three years. Heretors tho under Minority by the Act 17, Par. 1622, had only Liberty to buy their Tithes within two years of Expeding the Valuation; unless the Titular was Minor, or otherways impeded to fell: In which case the Heretor offering to buy within that space, was allowed to buy at any time immediately after Removal of the Impediment, By the Act 61, Par. 1. Char. 2. and the 28 Att. Seff. 3. Ibid It was competent to Heretors to buy within three years after Valuation: And Minors whose Tutors negleded the Buying of their Tithes in due time, were allowed an Action of Sale for two years after their Majority. By the Att 15. Sell. 3. Par. 2. Char. 2. and the Act 28. Par. 1. Ja. 7. Heretors had access to buy their Tithes within three years after the respective Dates of these Acts. But yet a Titular of Tithes having promis'd to sell them to the Heretor, was Decern'd by the Lords of Selfion to perform, albeit the time for Buying of Tithes had elapsed. (a) The Commission 1690, put He-

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⁽a) February 1682, Crauford of Ardmillan against the Lord Bargany.

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5. Where Lands are Liferented, the Heretor purchasing his Tithes, must give the Liferenter the Leading and Drawing for payment

of the valued Duty. (b)

6. Tho all Tithes indifcriminately may now bevalued: (c) Yet severals are of that Nature that they cannot be bought. Herein our prefent Conflicution doth vary a lit le from former Practice. The common Benefit allowed to Heretors of Buying their own Tithes was once not competent for any posses'd by Ecdefiaftical Titulars, the time of the Surrender: unless when under Tack in the Hands of others. In which case it was Determin'd by King Charles the first's Letter, that Heretors should have the Buying of their Tithes let by Bithops, or Beneficed Persons to Tacksmen; Or might purchate the Tacks, if the Beneficed Person refus'd to do it. For he was allowed the Prerogative of buying for the use of the Church. And then notwithstanding the Heretors so buying his Tithes: it was intire to the Ecclefiastick Titular to claim at the Ith of the Tack, the Benefit of the Act of Parliament, (d) And of the Reservation in the Clergies Submission; whereby the Tithes in their Possession were exeemed from Buying or Valuing. But now

⁽a) Act 30. Seff 2 Par. W. and M. (b) Acts 17. and 19. Par. 1633. (c) Act 30: Seff. 2. Par. W. and M. (d) Act 17. Par. 1633.

the Regulation is, that no Tithes can b bought that are either possest by Minister for their Stipends; (a) Or belong to the Queen by the Abolishing of Prelacy, so long as they remain Undisponed; Or that are appropriate to Colleges, Hospitals, or other pious Ules; Or that once pertained to the Herefor, who Dispon'd the Lands without or Referving the Tithes. (b) The Reafor of this last Exception is plain: For an He. retor who, having Stock and Tithe in his own Person, Feued only the Lands, should no more be Oblig'd to Sell his Tirhes, than a Superior his Feu duties, or an Heretor any Right of Property referv'd by him when he fold his Lands.

of Fishes taken in also Mari, might be valued and bought at the instance of the Heretor of the Ground where the Boats landed? It was alledged for the Negative; that the Act of Parliament provides only for the Valuation of the Tithes of Lands; And the Tithe of Fishes could not be called the Tithe of the Lands where they were unloaded. For, 1. The Stock which answers to that Tithe is not at all Predial, or maintained by the Strength of the Heretor's Ground; Nor yet is it the Product of his Tenents Industry; And being exacted of all Strangers, could not be called the Heretor's Tithe. 2. All the Title the Heretor

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⁽a) Att 30. Seff: 2. Parl: W. & M. (b) Att 24. Seff: 4. Ibid.

(411)

had, was only a Right to the Harbour and Port; Which carries the benefit of the Cuflom, but no Right to Fish imported, more than to the Property of a Loading of East-India Ware. Nay, he could not fet Tacks of the Fish of the Sea as being accidental, and the Sea igris publici, wherein he could not hinder his Tenents to fish without oppression. But yet it was found that these Tithes might be valued and bought, (a) for these Reasons. Teind-fish is not valued as taken in alto mari, more than the Custom of Goods is due, while the Ship is out at Sea. But as Cuftom for thefe is due upon the landing of the Ship: So the Teind Fish is exacted when the Boats come oShore, by vertue of their Landing. And therefore the Heretor had Interest to value the fame, as well as the Vicarage-teind of any other Goods upon his Ground. But this is not simply upon the account that he furnished the Boats with a Harbour. For as the Teind becomes due ipso momento, that the Boats land upon any part of his Ground, albeit there were no Harbour: So the Heretor has Right to feek the fame valued. Custom and Teind again, are different Cafualities, confiftent together: So as the Heretor may both value the Teind and exact the Custom. Nor are any other imported Goods save Fish lyable to a Teind. 2. That which may be fet in Tack

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⁽a) 22. July 1702. Sir James Hall of Dunglass against the Moderator of the Presbytry of Dumbar, Lord Alexander Hay, &c.

for a certain Duty, may be valued and bought And it's the ordinary custom throughout the Coast side, for every Boat to pay, some two. some four, some fix pounds Scots, some less and some more yearly, for the Teind nih communibus annis, one year with another. beit the Heretor of the Ground where the Boats land had no Right to the Stock of the Fish, he may value the Teind. For he hath no Right to the Stock of his Tenents Goods. and yet hath a good Interest to pursue a Valuation of the Vicarage teind. 4 It's no relevant Objection against the valuing of Teind Fish that the same is casual and uncertain: For all Vicarage_tithes are fuch for the most part, and yet may be valued; Yea, jactus retis is valuc. If the Teind-fish should be allocat to the Minister as a part of his modified Stipend, they behov'd to be valued: Otherways there could be no clear Locality; And the Heretors of the Parish could not know how far the modified Stipend is satisfied, and what Free-teind they have to buy.

8. Albeit a Sale of Tithes pursued upon the Act of Parliament is only competent before the Commission: Yet a pursuit upon a promile or conventional Obligation to fell Tithes was sustained before the Lords of Session, who ordain'd them to be fold at the Rate prescrib'd in the Act of Parliament; and remitted to one of their Number to determine the price. (a) Since the valuing and felling of

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⁽a) February 1682. Crawfurd of Ardmillan against the Lord Bargany.

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Tithes is much the general Interest of the Nation; And yet but little progress is therein made through the unfrequent sitting of the Commission, to which Court the Determination in these Matters is thirled: It were not amiss that the Parliament would authorize the Lords of Session to value and sell Tithes; Especially seing the rate and price of them are already six'd and determin'd by Law.

SECT. V.

Of Actions for Uniting, or Annexing and Dividing Parish-Churches, for Erecting of new Churches, and altering the Situation of others:

As Justinian for Reasons of State did conjoin several Magistracies and Jurisdictions: (a) So Ecclesiastick Benefices have been frequently united upon Motives of Convenience and Advantage to the Church. As when two Churches ly so near together, and the Bounds of their Parishes are so narrow, that one person may conveniently supply the Cure in both; Or, when both Stipends are but a competent Maintenance to one Minister. By the Canon Law the Pope only could Con-

⁽a) Nov: 8, 24, 25, 26, 27, 28, 29.

(414)

folidate two Bishopricks or larger Benefices into one: (a) But the conjoyning of Parish Churches was permitted to the ordinary, (b) with consent of his Chapter. (c) The Pope us'd frequently to unite Parfonages and other inferior Benefices to Bishopricks, upon pretext of their meannes: Which Benefices at the Reformation were ordained to be provided again with particular Ministers, whereof the Rents and Stipends were referv'd in the Gifis and Provisions of the Titular Bishops then made. The Canon Law doth not allow the uniting of Benefices lying within different Dioceses. (d) Nor of Benefices Patronate. either with others of that kind, or with Free Benefices. (e)

2. Scotsmen went frequently to Rome to get Benefices united, whereby much of the Nations Stock was exhausted and carried thicker. This oblig'd the Parliament to discharge all Union of Benefices, and declare the purchasing thereof Treason. (f) But now the Uniting of Parishes is allowed, and the Commission are the proper and sole Judges thereto. By the Union of two whole Parishes, sometimes one of the Churches is suppress'd, and the other declared to be the common Church for all the Parishioners within the united Bounds.

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so, the Parish of Perstoun at the Instance of the Earl of Eglingtoun, was annex'd to the Church of Dregborn: Both being small Parishes, having mean Stipends, and none of the Lands of Perffour lying beyond two Miles and a half from the faid Church. (a) So the Kirks of Innerarin and Meathie having been Fourty Years ferv'd by one Minister, the Lords upon Representaion that the Church of Innerarity was feated in the middle of both Parishes, and that Meathie Church was Ruinous; united them with consent of the Heretors. (b) And if neither of the united Churches be in a place where the Generality of the Parishioners may easily repair to; then both are demolished, and a new one erected about the Center of the common Parish. Sometimes two Parishes are fo united, that both Churches are kept up to be ferv'd by one Minister Alternatively; who preaches in each of em, only every other Sab-Such was the case of the Parishes of bath: Chanery and Rosemarkie: But in regard at the Union the Church of Chanery was Ruinous, and that of Rolemarkie had been lately Repaired: The Heretors were declared lyable only to repair and maintain their own respective Churches. (c) When Patronage obtained, and Churches belonging to different Patrons came to be united, they were allowed to present Ministers alternis vicibus, or by turns: (d)

^{(2) 26.} February 1668. (b) 24. July 1667. (c) February 2. 1670. John Bishop of Ross. (d) Act 3. Parl: 22. In: 6.

(416)

And the Patron of the greater Benefice to be the first Presenter. (a) Because the lesser being always annex'd to the greater, that remains the Principal and Mother Church. (b) But if one was suffered to present thrice successively without being question'd, he acquired thereby a Possessor Title to present for the next time also: Tho the other Pation might have declar'd his Right for the surre. (c) According to the Canon Law, no Temporary Union of Benefices could be made, as during any persons Life. (d) For, Dum agitur de causis facienda Unionis, maxime Cavendum est ne persona magis quam Ecclisia favor attendatur. (e)

3. Sometimes a larger Parish is dismembred of some Lands, to make up another. And these are often annex'd quoad curam animarum only: As the Lands of Newbaven are united to the Parish of North-Leith, and yet pay Stipend to the West-church at Edinburgh. Such Annexation transferrs only curam animarum, when there is not as much Free_teind of the Lands behind, as will compense the Ministers loss in his Stipend by the Dismembration. But if there be, then the disjoin'd Lands become a Subject affectable by a Stipend to the Incumbent whose Parish they're annexed to.

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⁽a) Mackenzie Observ: on the said Ast. (b) Arg. C. necolentes 3. Ext; de statu monachorum. (c) Mackenzie Observ:
on the 7 Ast 1. Parl: Ja: 6. (d) Bengaus de benefic: ad vicabulum quadam cap: 3 S. 2 N S. ...) Arg: cap: 1. vers:
maxime ne plus favisse persona Ext: ne sede vac: aliq: innov:
Bengaus Ibid. N. 7.

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(a) Lands are frequently dissolv'd from one Parish and annex'd to another, upon the account of a nearer and more easie access to the Church. So, Thomas Elphing ston of Galderhal obtain'd his Lands of Carfie dismembred from the Parish of St. Ninian; In respect of their distance from the Church, and the Ways being Impassible through Moss, Sea-tides, and broken Bridges: And got them annex'd to the Parish of Airth. (b) Mr. John Malcom of Balbedie got his Lands disjoin'd from the Parish of Auchterdiran, and annex'd to Ballingrie, upon his Petition and an Act of the Presbytry of Kirkaldie, finding the Alteration necessary and convenient: Without prejudice to the Minister of Auchterdiran's Interest. (c) The Earl of Kincardin procur'd a Dismembration of his Lands of Kincardin from the Parish of Culross, and got them annex'd to Tulliallan, upon a Report of the Presbytry recommending the thing as fit to be done. Some Lands being difmembred from one Parish, and added to another within a different Diocie, the Difmembration was reduced, in respect it was not only a Derogation to the Jurisdiction of one Bishop in favours of another; But also did cut off the former Minister from so much of Stipend as the Free-teind of his Parish could not make up. (d) Another Decreet obtain'd in the year 1650, dismembring the Lands of Lambertoun from Ayton-Church, and annexing them

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⁽a) Vid: Sup: Sest: 2. N. 4. (b) February 15. 1665. (c) 21. July 1669. (d) February 19. 1662. Earl of Kinghorn and others, against Walker Minister at Auchtertool.

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to Mordingtoun, was reduc'd for not production upon these Reasons; r. The Lands annex'd lay more convenient to the Parish. church they were taken from. 2. The Stipend thereof by the Difunion was rendered very inconsiderable; Nor was the Minister of Aytoun called to the pronouncing of that Decreet. And 2. The King as Patron was prejudg'd. (a) of which Decreet Reductive there being a Reduction pursued by the Minister of Mon dingtoun upon these Reasons; 1. The Decreet in the year 1650 was just, having proceeded upon a Perambulation conform to the Act of Parliament, and the Presbytries Report of the convenience and necessity thereof, and the Heretors Supplication. To which the Minis ster of Aytoun could not then be called, in re-Spect the Church was vacant at the time: And there was abundance of Teind in the Parish to make up his loss by the Dif-union. 2. If Lambertoun continue united to Aytoun, Longformacus should return to Mordingtoun from whence it was disjoin'd: As in the case of Benefices excambed, whereof by Law the one stands bound for the other. And 3. The King had no prejudice. The Lords of Commission alfoilzied from the Reduction in fo far as concerned the Dismembration, and reduc'd quoad the Stipend payable out of the Disjoin'd Lands. Which they ordain'd to be equally divided betwixt the Ministers of Aytoun and Mordingtoun: But the Minister of Aytonn was not found ly-

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⁽a) February 25. 1663. Hume Minister of Aytoun against Ramsay Minister of Mordingtoun and others.

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able to restore or hold compt for any part of his Intromission therewith during the standing arish. of the former Decreet of Reduction, (a) But ipend dereafter, (b) it being instructed that the Stivery send formerly due to the Minister of Merdingout of Longformacus before the dismem? ration on't, was equivalent to that payable out of the Lands of Lambertoun; They annex'd being the said Stipend to Mordingtoun.

As the Smale distance of Lambertoun;

4. As the Smalnels of the Charge and Stiecreet bends, with the Contiguity and Nearness of Churches, are the ordinary Confiderations for Act of urning two into one: So where Parishes are of the wide and far extended, that the Inhabind the ants in the remoter parts, by their Distance Minis rom the Church, or the Interjection of Wain re-: And o partake in the Administration of the Di-Parish ine Ordinances; The common Remedy is, 2. If o make of one two Parishes, and build another Church in a convenient place for the new thence frection. And this is conform to the Canon nefices aw. (c) A Decreet erecting a new Church flands the Castle of Cummock, and modifying a sign had sipend thereto, out of the Lands and Tithes sion af thereof the Earl of Dumfreis was Titular and scond lacksman, was reduc'd; in regard it did not lacksman, was fummoned, and the rest of Lands he Heretors consented, that the two Churled hes might be re-united in one. (d) An areas with the second sinto a Parish by the ngtoun: credion of some Lands into a Parish by the

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⁽a) February 22: 1671. (b) in July 1673. (c) C: enpimus & fieut duo 16: Qu: 1. (d) July 24: 1667.

Presbytery was reduc'd fummarly upon a Sup. plication, as being iplo facto null: (a) For the Presbytery has no power to erect, but only to represent the Conveniency thereof to the Commission. Orders for building of new Churches have sometimes been obtain'd from the Commission, upon a Bill given in to them. with the Presbyteries Recommendation; and fometimes upon Report of a Visitation and pointed by themselves. Mr. James Row Mi. nister at the United Kirks of Strowan and Mo nivaird having pursu'd his Parishioners for building him a Church; The Lords of Commission (b) recommended to the Bishop of Dumblane to consider the Situation of the Pa rish, and where it might be built most conve niently. Upon whose Report, the Church was ordain'd to be erected at Enoch, to serve both Parishes, and the Heretors to stent them felves for that effect: With Certification, i it were not built betwixt and Whit funday 1668 the present Church of Strowan should be the common Church for both Parishes; and pub lick Worship was appointed to be perform in the mean time as formerly.

modiously seated, an Order of Commission may be got, upon Application of the Parishioners, or the majority and most considerable of em, for setting up another in a more proper place about the middle of the Parish, and declaring the same, when built, to be the only

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⁽a) January 22: 1662, (b) January 29: 1667.

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Church of the Parish: They giving Security for building the new Church as good as the former; whereof no Expense should be laid upon those of the Parish, who express'd their Diffent from the Transplanting, by Protesting against it. (a) The Parish Church of Ochiltrie being Transported as Incommodious to fundry of the Heretors, and a Locality fettled to the Minister with a Glebe, Manse, and Grass adjacent to the new Church; The Lord Stair was declared Patron, and the Glebe given to Cunninghame of Brounbill, in lieu of his Right of Patronage of the Supprest Church of Barnvile. (b) A Warrand obtain'd for changing the Seat of the Church of Haffindean was rescinded, and counter Orders given to demolish the Church, and transport the Materials to a more proper place near Bruxholm, for building it there de nove. In regard the first Remove was made only to gratifie some particular persons, and found incommodious to most of the Parishioners: Which was attested by the Arch-Bishop of Glasgow. And Letters were ordain'd to be iffued out at the Instance of Sir William Purves the Church-Solicitor, for charging the Heretors to meet and stent themselves, and name a Collector. (c)

6. Sometimes Parish Churches are Erected, Transplanted, United, and Divided, by the Parliament. As the North Church of Leith

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⁽a) February 12: 1673: Lord Bargany contra Cathcart of Carleton and Boid of Pinkel. (b) July 19: 1673. (c) July 25: 1666: Duke and Dutchess of Buccleugh against Scot of Haychesters and others.

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was erected into a Parish Church by the 18. Parl. 7. 6: (a) And the Church of Ballintrae by his 22. Parl. (b) The Church of Gullane was translated to Dirletoun by the Parliament 1612. Sometimes the Parliament, upon Ap. plication made to them, refer'd the Determination absolutely to the Commission: As was done with the Petitions of the Parishioners of Roseneath, desiring their Church to be transported out of the Isle of Roseneath to the Lands of Ardinconnel, as a more convenient place; of John Earl of Wigtoun, and other Parishioners of the Parish of Leinzie, craving the Seat of their Church might be chang'd from the west end of the Parish, to some more commodious part near the middle; and of John Lord Hay of Yester, and the possessors of the Lands of Rodonno, for declaring these Lands to be a part of the Parish of Lyns, and for a Warrand to the faid Lord Hay to build a Church upon the most convenient place of his Lands of Rodonno or Megget, for ferving the Inhabitants at fuch times as they might be hindered by Storm from coming to the Church of Lyns; and of the Minister of Christs-Kirk at Udney, desiring to be sufficiently provided with a constant Local Stipend. (c) Sometimes the Parliament remitted fuch matters brought before them to the Commission with particular Instructions: As they did with the Petition of Thomas Burnet of Leyes, craving a new Church to be erected within the Parish of Fetteresso. (d)

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⁽a) Anno 1606. (b) 1617. (c) Act 5: Parl: 23: J: 6. (d) Ibid.

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7. As the Commission is the only Judicature having power to model and allocat Stipends to Ministers; value and fell Tithes; annex, unite and divide Parishes; erect new Churches. and alter the Situation of others: So thefe things being done, the Lords of Session are the proper Judges for discussing emergent points of Right; which gives me a fair Hint to pass to Adions competent before them touching Ministers Stipends, and Tithes.

CHAP. X.

Of Actions for Ministers Stipends before the Lords of Seffion.

ERARD Arch-Bishop of Tours wou'd not have Ministers pursue for Tithes, or procure their payment by force. (a) But in this corrupt Age, there is often a necessity upon them to use the Remedy of Law against such as unjustly withhold their Stipends.

2. Ministers with us are either maintained out of the Tithes of their Parishes, or are simple Stipendiaries. The former again are either left to the provision of the common Law, or are provided by Decreets of the Commission.

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⁽a) Thomassin la Discipline del'Eglise, Part 3: Liv: 3: Chap: 1: N: 5.

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3. By Ministers, whom only the common Law provides, I mean fuch as are in possession of Benefices by virtue of the 102. Act, Parl. 1581. Who have the fame Right to the Tithes of their respective Parishes, as the Popish Ec. clefiafticks had before the Reformation. (a) And may purfue Actions Petitory and Posses. fory, and Actions of Spuilzie, as well as any other Teind Masters. The benefit of a Possessory Judgment is competent to them upon feven Years quiet possession, without any other (b) And thirteen Years possession is a presumptive Title. (c) But now the Acts of Parliament 1690 and 1692 have given to Patrons the Right of Reversion of these Benefices. by whom they are redeemable from the Incumbents, upon their getting competent Stipends medified by Law.

4. Ministers whose Stipends are established by Decreets of the Commission, have either Modifications only, or Modifications and Lo-

calities.

5. When a Ministers Stipend is only modified, it affects the whole Tithes out of which it is modified; and may be exacted from any Heretor intrometting, or possessor, whose Tithes will go fo far; or so much on't according to their Extent. (d) Or from an Appry-

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⁽a) Stair Instit: Lib: 2: Tit: 8: § 26. (b) November 25: 1665: Peter contra Mitchelson, July 18: 1671: Earl of Hume contra Laird of Ryslaw, December 6: 1672: Veatch contra Weatherlie. (c) Hope Improbation, Bishop of Galloway contrathe Prebendaries of the Chappel Royal. (d) July 6: 1625: Mortoun contra Scot of Harden. December 3: 1664: Hu:chison contra Earl of Cassils.

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fer who might have intrometted. (a) Nor was a Ministers accepting a Precept not exprefly in full satisfaction, found to liberat the Heretor, except for what was receiv'd by virme thereof. (b) Yea there is Action competent to the Minister for his Stipend, even against the Tenents paying bona fide a joint Duty for Stock and Teind. (c) Nay, what's vet more, the Duty of a Back-Tack fet by a Wadfetter of Stock and Teind for his Annualrent only, was not exeemed from the Miniflers pretentions. (d) Where a Parfon having fet a Tack of the Tithes of his Parish to one of the Heretors, who wadfet some of his Land with the Tithes thereof, and got from the Wadfetter a Back-Tack for payment of the Annualrent of the Money for which the Wadlet was given: The Parson was found to have good Interest to require the Tack Duty, as a part of his Stipend, from whatfoever Intrometter with the Tithes of the Parish, effeiring to the Extent of their Intromission; and not obliged either to feek the Duty in parcels from every particular Medler, or yet to be refricted to his own Tackiman; And the receiving of the Wadlet of Stock and Teind with the back-fetting of both, fustain'd to make the Wadfetter liable to the Parson as Intromettor with the Teinds, for so much of the Tack Duty as the Wadfer Teinds did extend to.

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⁽a) December 20: 1622: Pressoun contra the Minister of
(b) November 9: 1677: Rutherfoord contra
Murray. (c) February 19: 1629: Kirk contra Gilchrist. (d)
March 21: 1633: Keith contra Gray and Carmichael.

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But afterward (a) it was found, that the Wadletter, as deriving Right from the principal Tacksmen, was not liable to pay the whole Tack Duty to the Parson, but only that proportion which the Wadlet Lands were in use to pay before the Tack of Rental Bolls; the taking whereof, without Inhibition us'd, was no Interruption of old use of payment against him the Wadletter, albeit it was sufficient against the principal Tacksman himself. But then the Heretor, Appryser or Wadsetter distress'd gets a proportional Relief off the rest; and Tenents an intire Relief off their Master.

6. Though when a Stipend is only modified out of the Tithes of a Parish, 'tis a Burden affecting the whole: Yet when the Tithes of certain Lands are allocat for payment of it, Intrometters only with these Tithes are liable. (b) And the Minister has no Title to any Tithes without the Bounds of his Locality. (c) But yet a Minister was not bound up by a Decreet of Locality never own'd by him or his Predecessors, from seeking a larger Stipend out of the Tithes of his Parish conform to thirteen Years peaceable possession. (d) A Charge upon a Decreet of Locality for three Chalders of Victual was fustained to the Minister, although no Victual was payed in the Parish. (e) And a Stipend being local'd up-

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⁽a) July 23: 1633. Inter eosdem. (b) Stair Institution Lib: 2: Tit: 8 \$ 30. (c) Arg: Dec: January 19: 1669: Earl of Athole contra Robertson of Strowan. (d) November 1676: Semple contra his Parishioners. (e) Aikman Minister at Dalmellingtoun against Cunninghame of Milcraig.

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on a Tacksman of Tithes, a singular Successor to the Right of 'em was found liable in payment. (a) A Minister having charg'd for payment of the Bolls contained in his Decreet Locality, the Debtor was ordained to denone upon the prices he got: Albeit he had offered the Fiars, by way of Instrument, within feven days after the Charge; and produced Receipts of the Charger and his Predeceffors for instructing, that they were not in use to uplift the Bolls in ipsis corporibus. (b) It being highly unreasonable, to oblige a Minister to accept the Fiars, who buyes Victual himfelf at Mercat Rates. But a Minister having accepted a Precept for his Stipend-Bolls from the Titular of the Tithes upon an Her retor of the Parich, who entered in payment ther the ordinary time of delivering the Stipend was past, but did not fatisfy the whole: and the Titular having upon a Charge made Offer of the remaining Bolls under Form of Instrument, which the Minister refus'd: He the Titular was only found liable according to the Fiars. (c)

7. The Bolls in a Ministers Decreet of modification or Locality should be payed conform to Linlithgow Measure, if no Measure be therein specified: Unless the Minister hath been thirteen Years in Possession of uplisting according to another Measure; or the modification

⁽²⁾ Inter eosdem. (b) February 21: 1699: Houison Minister of Inverask against Sir William Sharp. (c) Februa-777: 1705: Liver Minister at Mertoun against Haliburtoun of Newmains.

fied Stipend would fall short of the Quantity in the Act of Parliament by Linlithgow Meafure. For in such a Case the Lords found, that the Minister ought to be pay'd conform to the Measure of the Shire, within which the Parish lay. (a)

8. Where, in Infefrments of Erection, the Reddendo is a Blench Duty, and so much beside for Stipend to the Minister, such a Stipend is not Debitum Fundi, seing the Reddendo relates not to Lands, but to Teinds, which are only a Benefit arising out of the Lands, and so no more affects the Ground than Teinds do.

9. Ministers are sometimes oblig'd to pursue not only for payment of their Stipends; but even for the Sum that is modified for Communion Elements. To pay which the Heretors are liable, tho the Communion be not administrated. (b) But according to Sir George Mackenzie, (c) it should be given to the Poor in that Case, and not to the Minister. Yet he has then the Application. So a Minister pursuing for payment of a Sum modified in his Decreet of Locality for Communion Elements obtain'd Decreet upon an Offer to put it in the Poors Box of the Parish. (d)

within Burgh, who having no Landwart Parish, or being only second Ministers where the first have the Tithes, are maintain'd upon Gifts and Mortifications; or a voluntary Con-

tribution laid upo cording they pay who are by the But all] priviled munitie Date w been fi ment; Mary's have b **fpecial** burgb, the Lo Amon Annui reckor rator a was fo retors pend, Presci lis & tent t teen to Si

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⁽a) June 27: 1667: Minister of Dalrymple contra Earl of Cassils. (b) Act 54: Parl: 3: J: 6. (c) Observ: on the said Act. (d) November 29: 1679: Birnie contra Earl of Nithsdale. tribution

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tibution of the Inhabitants; or Annuities laid upon them by Order of Parliament, according to the proportion of House Rent they pay. Stranger-Inhabitants within Burgh who are not Burgesses, but have Advantage by the Ministry, may be stented for Stipend. But all Members of the Colledge of Justice are priviledg'd. (a) The priviledges and Immunities of the Colledge of Justice are of a Date with the Institution thereof, and have been fince ratified by many Acts of Parliament: particularly by the only Act of Queen Mary's second Parliament, which seems to have been conveen'd for that fole end. Their special priviledges within the Town of Edinburgh, and Liberties thereof, were declared by the Lords of Session in foro contentioso: (b) Among which the Immunity from payment of Annuity for the Ministers Stipends is expresly reckon'd. And upon that Decreet of Declarator an Act of Sederunt was made. A Burgh was found to have no power to stent their Heretors for any part of a second Ministers Stipend, not due by Law, Consent of Party, or Prescription. (c) The priviledge of Decennalis & Triennalis Possessio was not found competent to the Ministers of Edinburgh, upon thirteen Years payment of an Annuity, effeiring to Six of the Hundred of the Rents of the Houses; albeit the said Annuity was destin'd by Act of Parliament as the Fund of their Sti-

⁽²⁾ Att 276: Parl: 15: Ja: 6: Mackenzie Observ: on the said Att. (b) February 23: 1687. (c) July 22: 1668: February 1: 1669: Boswal contra Town of Kirkaldie.

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pends: In regard they neither had Right thereto Jure Communi, but only ex Provisione Hominis; nor was it payed to themselves, but to the Town for their behoof. And it might have been applyed to another use: Since the Ministers Provision was not restricted to the Annuity; but the Town was liable to them for fuch a Sum yearly, which, tho no Annuity were recovered off the Inhabitants, behov'd to be made up out of the Common Good. An Heretor who oblig'd himself to pay the Ministers whole Stipend, and to relieve another thereof, was only found liable for the proportion of Stipend payable to the Minister the time of the Obligement, and not for posterior Augmentations. (b)

procure Decreets conform upon Decreets of Locality obtained by their Predecessors; which piece of Diligence being found unnecessary, inconvenient, and chargeable: An Act of sederant was made, (c) declaring it needless for any Minister to seek for a Decreet conform upon his Predecessors Decreet of Locality; and that upon a common Bill given in by a Minister with his Act of Admission, and Decreet of Locality, tho obtain'd by his Predecessors, Horning might pass against those liable for his Stipend. General Letters of Horning (that is, which do not express nominatim the persons to be charg'd) are allowed, for Impersons to be charg'd and allowed, for Impersons to be charg'd and are allowed.

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⁽²⁾ February 23: 1687: The Members of the Colledge of Justice against the Town of Edinburgh. (b) January 1688: Maikenzie contra Viscount of Oxfoord. (c) June 22: 1687.

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plement of Decreets of Locality. (a) And thefe Letters are effectual, not only against the perfons decerned in the Decreets, but also a fainst their Heirs and Singular Successors possessing the Lands affected with the Localities. But Summar Horning was not fustain'd at the Instance of a Ministers Executor for his Stipend. (c) Ministers pointing for their Stipends, need not to carry the Goods to the Mercat-Cross of the Head Burgh of the proper Jurisdiation; but may comprise them on the Ground where they are by honest sworn Men. (d) No Suspension of special Decreets for Ministers Stipends can pass, except upon Production of Discharges, or upon Confignation of the Sums charg'd for, and if Victual be the Subject of the Charge, 100 Merks must be confign'd for each Chalder, and proportionally, where less than a Chalder is charged: Without prejudice to the Lords of Seffion to modifie more or less at the discussing: (e) Actions for Ministers Stipends commenc'd in interior Courts cannot be Advocated; Sufpensions of and Actions for them before the Seffion are discuss'd summarly, without running the Course of the Roll; and Suspenders, against whom Letters are found orderly proceeded, should be decern'd in a fifth part more

⁽²⁾ Act 13: Seff. 2: Parl: W: and M. (b) Stair Instit: Lib: 4: Tit. 47: § 4. (c) December 17: 1623: Reliet of the Minister of Livingstown contra Parishioners. (d) Act 21: Seff: 3: Parl: 1: Ch: 2! (e) Act 6: Seff: 1: Parl: 2: Ch: 2.

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at least, than the Sums charg'd, for Expense

and Dammage. (a)

12. 'Tis no good Reason against the paye ment of a Ministers Stipend, that he is Rich and otherways well to live in the World. (b) The Quakers cannot comprehend why any should be obliged to contribute to a Ministers Maintenance: but fuch as are taught by him Which perverse Notion gave rise to the merry Conceit of the Barber, who pretended as good Right to Shaving money from the Parlon to whom he never performed his Office; As he the Parson had to claim any part of his Stipendfrom him, who, though a Parishioner, came never to Church, and had no Benefit by the Preaching or other Ministerial Duties. forfooth Men were left equally indifferent in the choice of their Minister and Barber: A fancy fo absurd, as none can digest, but a Set of Men who have no other than Jeroboam's Ordination among them. (c) These people, (who don't judge of things from the Principles of Reason and Justice, but by an unaccountable Light within them) pretend their Conscience does not allow them to pay Tithes to a Minister. Some of 'em are so obstinatein the Matter, that rather than do it, they will go to Prison and ly there; Others who are more peaceable, chuse to pay their Land-lord more Rent, that he may free them from Tithing.

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⁽a) Act 27. Seff: 5. Parl: W. & M. (b) Bruneman: d jure Eccles: lib: 2. cap: 5: N. 1. (c) 1 Kings. 13. & 33.

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12. As our Law has indulg'd to Ministers fummar and priviledg'd Execution, for making their Scipends effectual by payment; For that they are commonly suppos'd not to have much to depend upon beside their Stipends. and confequently unable to want 'em long: So Stipends not purfued within five years prescribe quoad modum probandi; cause after that time they are prefum'd to be pay'd; unless the prefumption can be taken off by the Debtors Oath, or by Writ. (a) Nor was a mortified Stipend exeem'd from this Quinquene nial Prescription. (b) An Heretor being purfued for payment of a proportion of the Miniflers Stipend specially localled upon the Lands of other Heretors, and uplifted from them by the Defender's Predecessors: He alledged Prescription upon the 9. Act Park: 1669. And if the Claim prescriv'd as to those principally lyable, it cannot subsist against any Intromet. ter; unless it be proven by the Oatles of the principal Parties, that their proportions of the Stipend are still resting. payment to the Pursuer would not affoilzie at the hands of the Heretors whose Teinds were intrometted with fine titulo. In regard they could not be bound to allow a Debt against which themselves were secured by pre-It was Reply'd, That the Defender scription. was not purfued as immediately lyable for the Stipend, but as having in his hand fine caufa

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⁽²⁾ At 9. Seff. 1. Parl. 2. Ch. 2. (b) Mackenzie Obferv:on the faid At.

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these quantities of Money and Victual pay? able to the Minister by other Heretors: Info far as he took up the whole Tithes of the Pa. rish, notwithstanding the Minister's Decreet of Locality. And as a Ministers Factor would certainly be lyable much longer than five years to hold compt for Stipend uplifted by him: So this Action founded upon the common ground of Eaw, quod nemo debet alieno damno locupletari. should run the course of long Prescription as gainst the Defender as Intrometter, negotiorum gefter, or something less favourable. And the Difficulty suppos'd in case the Heretor should pursue Repetition, is imaginary. For albeit within the five years they might have purfued the Defender either to refound, or to procure the Minister's Discharge; they had no longer Interest after elapsing of the Quinquennium. And if the Defender had any fears of being afterwards called to account by them; he should have cited them with the Minister in a multiple-poinding, and then the Minister would have been prefer'd. The Lords before Answer allowed the Pursuer to prove the Defenders Predecessors Intromission with the Teinds, and that they were in use to pay the Ministers Stipend. (a)

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⁽a) 15. January 1704. Mistriss Eccles against the Earl of Dundonald.

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Of Actions about Tithes falling under the Cognizance of the Lords of Selsion.

defines it, is A profecution by any Party of their Right, in order to a fudicial Determination thereof. (a) Actions with us are either Petitory, or Possessor, or Declaratory. Petitory Actions are those whereby we pursue Restitution or Delivery of any thing, conform to some Real or Personal Right. In Possessor, Actions the Pursuer doth not found upon the Point of Right, but upon Possessor only. Declaratory Actions are only for Declaring and Establishing some Right or Possessor, without a Conclusion of any thing to be done upon it; And are us'd when there is Competition of Rights. (b)

2. No part of our Law hath furnished more Debate & variety of Action, than the Matter of Tithes: And they have frequently been the Subject of Quarrels. To prevent which, the Privy Council have sometimes interposed to Sequestrate them when contraverted: As was done September 1608, with the Tithes of Dy-sert, that the Lord and Patrick Sinclair were contending for, which, by Council Letters, ei-

⁽a) Instit, lib. 4. tit: 3. 9. 20. (b) Ibid. 9. 47. E e 2 ther

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ther Party were discharg'd to intromet with, and the Laird of Bogie as a Neuter-friend appoint. ed to collect and keep for the behoof of him who should be found to have best Right.

2. There are Petitory and Possessory Actions, and Actions of Spuilzie competent for Tithes: And that not only to Ministers in particular, of which I have treated in the foregoing Chapter; But also to any other A poinding of the Ground is Teind-master. an ordinary Petitory Action proceeding upon an Infeftment of Annualrent out of Lands. But poinding of Tithes at the Instance of a person having Right by Infefrment to an Annuity out of them, was found unwarrantable. (a) For though Possessors and Intrometters with the Tithes are lyable to fuch as have Right thereto, the ipfa corpora cannot be poin-Tithes afford fometimes a Petitory Action according to Tack or Tacite-relocation, or use of payment, which imports a verbal Tack. Tacite-relocation doth not only defend the Possessor from being lyable in any higher Duty for his Tithes, than according to former use of payment; (b) But also it is allowed as a good Active Title to pursue for Teind. (c) Tacite-relocation or use of payment oblige no longer than both parties continue to acquiesce therein. And therefore it is interrupted by eith (a) at Offer Teind

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⁽a) Sir Patrick Hume against the Lady Plendergeft. (b) 28. November 1676. Sheil contra Parishioners of Prestounhaugh. Fanuary 19. 1669. Earl of Athole contra Robertson of Strowsn. (c) Fanuary 16. 1663. Earl of Errol contra Tenents of Uriu Vide Supra Chap. 6. Sect. 4. N. 13.

Birnie of Eg March Stair Pratt

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rupted by Inhibition in Parsonage-tithes, and by either Inhibition or Citation in Vicarage, (a) at the Instance of the Titular, or by an Offer from the Heretor of the draw'n Teind debito tempore. But an Offer of the ipfa corpora in April 1678, was found not to cut offuse of payment for the Crop 1677. (b)

4. Inhibition of Teinds may not only be execute by a Messenger, but even by any perfon as Sheriff in that part. (c) And mostly it is done by vertue of a Commissar-Order. For Commissars are the ordinary, and only inferior Judges, upon whose Precepts Inhibition of Teinds is execute. Inhibition is the legal and habile way of interrupting Tacit Relocation, and use of payment: Which being once duly raised and execute, hath the like Effect; as a Warning against the Tenents and Possessors of Lands, for that and all sublequent Years, and makes posterior Intrometters liable to a Spuilzie. (d) But it doth not impower the Titular to draw the Teind by fummar Violence; which cannot be done before a Sentence obtain'd upon the Inhibition, withour incurring the Hazard of a Spuilzie. (e) Altho the User of the Inhibition is understood to be in the civil Possession thereby. (f) For the Party may have Reasons, why

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⁽a) Stair Ibid. Tit 24. § 11. (b) November 29. 1678. Birnie contra Earl of Nithscale: (c) January 27. 1666. Earl of Eglingtoun against the Laird of Cunninghamhead. (d) March 18. 1628. Lord Blantyre contra Parishioners of Bothwel. Stair Ibid: Lib. 2. Tit. 8. S 23. (e) Ibid. (f) Hope Maj. Pratt. Tit. Patrimony of the Church.

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his Tithes ought not to be drawn. So, a Tacksman being pursued as guilty of a Spuilzie, for having brevi manu, after Inhibition, drawn some persons Teind, to which themselves pretended Right; the violent Teinding was found unwarrantable : But the Lords desir'd the Pursuer to restrict to Wrongous Intromisfion, and pass from the Oath in Litem. Another was found liable in a Spuilzie, for prefuming to Teind at his own Hand, without Warrand of a Judge, or the Confent of the Owner of the Corns. Albeit he the Proprietar had no Right to the Teinds, and his own Intromission would have afforded Action of Spuilzie to the other. (b) For our Law is fo far from allowing persons to right them. selves in any matter at their own Hand, without Order of Law: That an Ejection was sustain'd at the Instance of one as Mailler to him, who not only had no Right to the Lands, out of which the Mailler was ejeded; but was also decern'd to remove at the Ejed! ers Instance; after whose removing in Obedience to the Sentence, the Mailler had viciously taken Possession, and might be conveen'd as an Intruder succeeding in the Vice. (0)

5. Inhibition of Teinds, like a Warning, is taken off by thereafter accepting the old Duty, or some part of it. (d) Which, though

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⁽a) January 27. 1665. Lairds of Beirford and Beinstein against the Lord Kingstoun. (b) Ult. January 1628. Nasmith contra Hume. (c) November 21. 1628. Bruce contra Bruce. (d) Stair Ibid.

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it be done but for one Year, will so far prejudge the Teind Master, that he can claim no greater Duty for that or any other Year thereafter; till there be a new Interruption by Inhibition. (a) Yea payment of the old Duty, conform to a Chamberlains Order, was fuflained sufficient to elide an Action of Spuilzie after Inhibition, without necessity to alledge, that the Chamberlain had the Pursuers Warn rand or Allowance for so doing. (b) Although a Warning is not understood to be past from, but by some Deed of the person at whose Instance it was given, or of one having his special orders to that effect. (c) Nay farther; in a Spuilzie of Teinds, payment of the Kings Taxation impos'd upon them, made by the Defenders to the Pursuers Chambers lain, and by him to his Majesties Collector, was found a relevant Exception both against the Spuilzie and Wrongous Intromission: Notwithstanding of a preceeding Inhibition; and albeit the Chamberlain had neither his Masters Warrand for receiving thereof, nor had compted to him for the same. (d) But then a Decreet after Inhibition for Rental Teind Bolls, and not a Spuilzie, was not judg'd reduceable upon this Reason, That the Obtainer had receiv'd payment of the Kings Taxation for the Year decerned, and so prejudg'd his Inbibition for that Year, for which he could feek no

32. 1628. Lord Loudoun contra Parishioners of Killimure.

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⁽a) March 25.1628 L. Blantyre contra Parishioners of Bothwel. (b) Feb: 13 1627. E. of Linlithgow contra Menzies of Culterraws. (c) March 5.4629. Laird of Ley contra Kirkwood. (d) February

more than the old Duty formerly in use to be payed:
Only the Taxation Money was allowed in satisfaction of the Decreet pro tanto. (a)

6. A Possessory Action is competent for the Teind in kind, or ip/a corpora. If the Teind. master hath neglected to draw his Teind for several years; and there be neither Tack nor use of payment to clear the Value: the Lords make the fifth part of the Rent the Standart. Allowing the Titular to require the fifth part for his bygone Tithes, and the Heretor to Exoner himself of his Obligation to the Titular by offering that proportion of But yet the Heretor cannot hinder by fuch an offer the Titular to draw his Teind: and therefore he should not be liable to give him the fifth of his Rent when he neglects to draw. The Liquidation of bygone Teinds, according to the fifth part of the Rent is a clear and easy method, when the Parsonage and Vicarage belong to one Titular. But when these are in different hands, they must be severally Libelled and Valued, conform to the Acts of Parliament The Parsonage Tithe being only due out of the Crop, the Libel must be particular as to what was fown, or the Quantity of the Crop, according to Proofing and Delivery by Taskers or Servants (b) A Summonds for Vicarage should mention all the particular Subjects out of which it is payable : because

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⁽a) Gordon contra Garlies. (b) Stair Ibid. Lib. 4. Tit.

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Vicarage is not the same in all places; and more things are Tithable in one part than in another. (a) Therefore the parson must prove the Quantity of the Corn-rent as the Subject of his Parsonage Tithe, and the Vicar must prove the value of his Vicarage by use of payment. (b) And if it cannot be infructed that any kind of Vicarage was formerly pay'd, none will be due. Tis to necessary that bygone Parsonage Tithes be liquidat with respect to the Annual Increase of Corn. that the Titular cannot claim for it, the fifth part of the whole Rent, deducing the Vicarage Duty; altho the Vicarage be already valued. For if the Vicarage be valued; and fince the Valuation the Heretors Rent is improven by Grass-rooms; the Vicar himself who has a far more Natural Right, would get no Benefit by the improven Rent, but behov'd to content himself with his valued Duty. is Nonfense to say that the Heretor hath no prejudice by paying the fifth part of his Rent, deducing the Vicarage Duty, fince the fifth of the constant Rent is the legal Right of Parsonage and Vicarage Tithe valued jointly with the Stock. For yes, the Defenders prejudice by fuch a Practice is manifest, since it deprives him of that ease acquired by the Valuation of his Vicarage Tithes. 2. To give one who has but Right to the Parsonage, the 5. part of the Heretors Rent, deducing the Vicarage

Duty,

⁽a) Ibid. S. 11. (b) June 30. 1668. Minister of Elgin contra his Parishioners.

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Duty, when the Subject of Vicarage is amplified; is to Subject the Heretor against all Law i'the World, to the payment of a double Tithe out of the same Subject, the one to the Vicar, and the other to the Parson. 3. If for liquidating the bygones of Parsonage Tithes, the whole Rent should be reckon'd, deducing only the Vicarage Duty, and fo the Parson get the Benefit of the Heretors improvement by Grass-rooms; albeit he had no Title to any Tithe out of that Subject; then by the same Parity of Reason the Tables being turn'd, and the case stated of an Heretor who had obtained his Parsonage Tithe, valued at the time when little of his Ground was Laboured; and long after improved his Rent by Tilling and Sowing: the Titular of the Vicarage might require the fifth part of the whole Improven Rent, deducing the old Parsonage Duty. The liquid price of bygone Teind-bolls is the Sheriff fiars. (a)

dling with Moveables in anothers Possession without the Persons Consent or Order of Law. Which the Committer is bound to Restore cum omni causa; and with the Violent Profits, that is such as the Injured Party might possibly have made thereof, to be estimate by his Oath in litem according to pretium as fectionis. So that it differs from wrongous Intromission, which is but a general Action com-

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⁽a) 14 July 1704. Bothwel of Glencorse contra Porterfuld of Commission and his Tenents.

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netent for recovery of Goods to the Owner. when he wants a more special Title to call the Possessor in question, against whom the conclusion is only to make him lyable to Refore the thing with the natural Fruits on't, least in so far as he was lucratus thereby f bona fide Possessor; together with Dammages when the Possession is fraudulent. Action for wrongous Intromission with Teinds, was fustained against one who had a Warrand from the Commission-court for what he did, Impowering him to Intromet upon inding Caution to pay the Quantity the Teinds should be valued at; and notwithfanding the Teinds were valued, and the Valustion approven by the Commission, without respect thereto, the Defender was Decerned according to the Prices and Quantity proven. In regard the Pursuer had not submitted, and so could not be tied by the Act of Commission; and the Defender sought that Warrand upon his own Peril and Hazard. (a)

8. A Spuilzie of Teinds is competent when the Teind-master who drew the Teind the year immediately preceeding, or us'd Inhibition, is either debarred by Force, or disappointed by anothers having Intrometted with the same. (b) There is place for a Spuilzie in Parsonage-Tithes, although the Teindmaster was not hindered to draw the Teind,

⁽²⁾ July 31. 1632. Douglass contra L. Ednem. (b) Stair Instit. Lib. 2. Tit. 8. S. 23. lib. 4. tit. 24. S. 2.

if he was in immediate Possession; and the Possessor did not separate the Tithe from the Stock, and preferve it in the terms of the Ad of Parliament. (a) But a Spuilzie of Vica rage is no otherwise competent, than if the Teindmaster was both immediately in Possessi on of Drawing thereof, and debarr'd by the Possessor or other Intromettor. (b) A Spuil. zie is not infer'd by Intromission with Rentaled or Valued Teind. (c) Nor yet by meddling with any Teind, if the Tithe mafter was not in Possession of drawing Teind the former year. In which case he cannot claim violent Profits, but only the accustom. ed Duty till Interruption by Citation or Inhibition. (d) 'Tis no relevant Exception against a Spuilzie of Teinds at his instance who acted as Teind-mafter for a preceeding Crop. that the last years Teinding cannot be called possession of the present Teind; And the Maxim Spoliatus ante omnia restituendus holds only where there is Spolium ejusdem corporis. For this Alleadgeance was proponed and Repelled in the case of the Lady Rentoun against her Son. (e) And he who is in possession of the Tithes of a part of Land, by virtue of a Title to the whole, may purfue a Spuilzie of the Teinds of the whole: For possession of a part, in this case, induces possession of the whole. (f) Tenents who pay a

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⁽a) Ast 9. Par. 22. Ja. 6. (b) Stair ibid. §. 12. (c)
23 March 1622. Gordon contra L. Garlies. (d) January
19. 1669. E. of Athel contra Robertson of Strowan, (e) July
7, 1629. (f) Balfour Prat.

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joint-Duty for Stock and Teind, intrometting with the Teinds after Inhibition ferv'd, the prices must be proven by Witnesses, and not by the Pursuers Oath as in Spuilzies. Nor yet can the Furamentum in litem, be obmuded against any Heretor for simply medding after Inhibition with the whole Growth of Lands in his own natural possession without separating the Teind from the Stock : altho in that case he is liable for a Spuilzie of Teinds; that is for the true Value of them, without regard to what was usually payed before Inhibition. But if the possessor should Forcibly hinder the Tithe mafter from drawing the Teind, by virtue of a Decreet upon the back of an Inhibition: he behov'd to submit to the Teind-masters Oath in litem. As the Teind-master behov'd to give way to his Oath, for violently drawing the Teind after Inhibition without a judicial Sentence. (6)

9. The proper Defences in Actions of Tithes may be founded, I. Upon a progress of Infefrments in the Lands, cum Decimis inclusis nunquam antea separatis, which secures the Heretor from payment: unless it can be made appear that the Stock and Tithe were once separate. (c) 2. Upon a legal priviledge of Exemption from payment: fuch as is competent to Ministers Glebes by Act of

Parliament:

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⁽a) Ibid. (b) January 27. 1665. Lairds of Beirford and Beinstoun against Lord Kingstoun. (c) Stair Instit. Lib. 2. Tit. 8. 9. 10.

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Parliament; (a) And in the days of Yore was Indulg'd to the Lands of Hospitalers, Temp. lars, and Ciftercians; and once was Decid ed with us in Favours of those who have Right to Cistercian Lands. (b) 3. The negative Prescription is a good Defence in Actions for Vicarage: (c) And also for Parsonage Teind-duties preceeding fourty Years. (d) 4. Seven years quiet possession either by vertue of an Infestement in Tithes, (e) or of a Tack, (f) affords the De-

fence of a Possessory Judgement.

10. Pleas concerning points of Right, arifing from Decreets of the Commission, are competent before the Lords of Session. So they Decern for payment of bygone valued Duties, conform to Decreets of Valuation But they do not regard these as a Rule for years preceeding the Valuation: For fuch Decreets cannot be draw'n back, Becaule they run thus Decerns and Declares, &c. to be the true yearly worth of such Teinds in all time coming And farther, Tithes are valued according to the present Rent, which may vastly differ from that of bygone years. If there has been a Decreet of Valuation, and the same is loft, it may be question'd whether the Tenour can be made up and proven? Ratio Dubitandi, Decreets and judicial Deeds pro-

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⁽a) Att 62. Par. 5. Att 10. Par. 23: 7a. 6. (b) July 15. 1664. Crawford against L. of Prestoungrange. Supra. Chap. 6. Sett. 5. N. 12 (d) Ibid. N. 9. (c) Vid (c) Ibid N. 3. (f) Ibid. N. 4. 60.

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ged, and the Validity of 'em depend upon Greral Formalities that Witnesses are neither suppos'd to know, nor allowed to prove. And for that same Reason the Tenure of Letters of Horning, Executions and Indorations thereof are not admitted to be proven by the Lubrick Testimony of Witnesses. (a) For it is not enough that Witnesses may remember that there was fuch a Decreet: fince they cannot be positive, at least ought not to trusted if the same was formal. 2. If the Tenure of Decreets were allowed to be made up, how easily might an Extract be pretended of one that never was, and be shewed to feveral persons, and perhaps a Copie on't be taken. Upon which the Tenure by a Process may be offer'd to be made up: whereby the way would be pav'd to Fraud and Forgery. But yet in the case of Mr. George Douglass against the Heretors of Birfe. (b) The Lords admitted the Tenure of a Decreet of Prorogation of a Tack of Teinds by the Commission of Plat to be proven. It is true to admit easily and promiscuously the Tenures of Decreets to be proven, might expose the Securities of the Nation, by making up of false or null Deeds that way: And on the other hand to allow no Remedy where Writs are Destroyed by Sudden Accidents is against all Reason. Therefore in proving Tenures of Decreets, the Libel is not sustained untill Parties are heard, both as to

⁽¹⁾ Ast 94. Par. 6. Ja. 6. (b) December 1704.

the Causes Amissionis, and pregnancy of Ad minicles; whereas in other cases they are allowed to prove as they best can. 2. Ast Suspicio the Objection against proving the Tenure of judicial Writs, viz. that these contain So lemnities by Omission whereof the Deed i intirely null: It is certain that even Bond and Dispositions require Solemnities, such a the Defignation of Writers Name and Witnes fes. And Seafines confift of many Solemn Essential Circumstances; and yet Declara tors for proving the Tenure of these Write have been often sustained. Now judicial Ad are no less liable to Accidents than other Writs; which is the only Caufe for allowing to make up Tenures. So that the for preven ting Forgery, the Lords require more preg nant Causes Amissionis, and written Adminicles in a Process for making up the Tenure of a Decreet: the proving thereof can by no Law be fimply refus'd. It is true that hath been sometimes done, but mostly in the Decreets of Appryfing, which are odious Diligences, and the less Authentick, as being led before Messengers, Sherss in that part and compos'd of the Messengers Execution, and Attestation of a Nottar. And yet a purfute for making up the Tenure of a Com pryfing was fustained, where the Adminicles were very pregnant, and the Executions extant and intire. (a) Therefore when the

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⁽a) Dirleton Decis. 24 June 1675. Birnie contra Montgomerie.

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of Sale may be pursued before the Session, And albeit by Act of the Commission. (b) The price of Tithes should be payed at Whitsunday preceeding the Crop, with Annualrent from that Term: The Lords of Session found that a Decreet of the Commission, Ordaining the Titular to sell Teinds upon payment of a certain price, did not debar him from

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⁽a) 14 July 1702. Bothwel of Glencorse against Portersield of Comistoun and his Tenents. (b) 30 November 1631.

(450)

these Teinds till the price was payed, or offer'd and confign'd upon resusal; and that he was not bound to Accept the Annualrent thereof in satisfaction of the Teind. (a) A Sale of Tithes can only be pursued upon the Act of Parliament before the Commission. But the Lords of Session sustain'd themselves Judges in a Proces upon a promise to sell Tithes, and Ordained them to be Sold at Nine Years Purchase; and referr'd to one of their Number, to Calculat and Determine the Price. (b) And perhaps it were the Nations Interest, that all Process for Valuing and Selling of Tithes were competent before the Session.

(a) 24 February 1669 E. of Kincardin against Laird of Rosyth. (b) February 1682, Craufurd of Ardmillan against the Lord Bargany.

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